(15,618)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 126.

RANSOM PAYNE, APPELLANT,

vs.

W. S. ROBERTSON, JOHN FOSTER, A. C. SCHNELL, AND XENOPHON FITZGERALD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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1 TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

In the District Court for the County and Territory Aforesaid, First Judicial District, of the March Term, 1892.

RANSOM PAYNE, Plaintiff,
against
W. S. ROBERTSON, JOHN FOSTER, A. C. SCHNELL, and ZENOPHON FITZGERALD, Defendants.

The plaintiff, Ransom Payne, complains of W. S. Robertson, John Foster, A. C. Schnell, and Zenophon Fitzgerald, defendants herein, and for cause of action says—

That the plaintiff is a citizen of the United States and a resident of Logan county, in said Territory of Oklahoma; that prior to and on the 22nd day of April, 1889, A. D., he was a deputy United States marshal, and had been duly appointed and qualified as such deputy marshal for the district of Kansas, to which district that part of the Territory known as Oklahoma was by act of Congress in such case made and provided attached for judicial purposes; that his appointment as such United States deputy marshal and his qualifying as such took place prior to the passage of the act of Congress of March 2nd, 1889, providing for opening the Oklahoma lands for settlement.

That after the passage of the aforesaid act of Congress and after the issuance of the proclamation of the President of the
2 United States of date of March 23rd, 1889, declaring said land open to homestead settlement on and after 12 o'clock noon on the 22nd day of April, 1889, that plaintiff was ordered by his superior officer, the marshal of the United States for the aforesaid district, to go into said Territory as deputy marshal aforesaid and to the locality where the United States land office at Guthrie was located; and the plaintiff, as a deputy United States marshal, in obedience to the aforesaid order and direction of his superior officer and in the discharge of his official duties as such officer, was, at noon on said 22nd day of April, 1889, at or near the United States land office at Guthrie, in said Territory, for the purpose of maintaining the peace and seeing that public order was maintained and to arrest violators of the law; and being so rightfully in said Territory in the discharge of his official duties and in obedience to the orders of his superior officer, and having all the qualifications required under the acts of Congress in such cases made and provided and under the provisions of said act of Congress of March the 2nd, 1889, providing for the opening of the Oklahoma lands to settlement, entitling him to take and hold a homestead of 160 acres of land in said Territory, he did, after 12 o'clock noon on said 22nd day of April, 1889, settle upon the N. W. ¼ of sec. nine, township sixteen (16), range two (2) W.; that he at once commenced digging a well on said tract of land and claimed the same as

his homestead; that he afterwards, on the 23rd day of April, 1889, duly entered the same at the United States land office in Guthrie, Oklahoma Territory, and paid fourteen dollars, being the Government price and charges for the entry of said land as a homestead, and received the duplicate receipt of
3 the receiver of said land office, a copy of which is herewith filed, marked Exhibit "A," and made a part of the complaint; that by virtue of said settlement, entry, and payment as aforesaid the plaintiff acquired the equitable title to said tract of land; that he built a house thereon and enclosed a part thereof; that since his aforesaid settlement he has continued to reside upon and cultivate the land so enclosed as his homestead, and still continues to reside upon and use and cultivate all of said land not occupied by intruders thereon; that his said settlement and entry as aforesaid were made in good faith and for the *bona fide* purpose of acquiring the same as a homestead under the homestead law, and that he has in all respects fully complied with all the requirements of the homestead law; that he was and is a citizen of the United States, over twenty-one years of age; that he has never entered upon and occupied any part of the land opened to homestead settlement under the provisions of the act of Congress dated March 2nd, 1889, and the proclamation of the President of the United States of date of March the 23rd, 1889, after the passage of said act and prior to noon of April 22nd, 1889; that the only entry he ever made into said Territory between March 2nd, 1889, and noon on the 22nd day of April, 1889, was the entry aforesaid as a deputy United States marshal rightfully in the discharge of his official duties as such deputy marshal and in obedience to the orders and directions of the United States marshal for the district of Kansas, to which district said Territory of Oklahoma was attached for judicial purposes at that time; and at the time of said entry by plaintiff as aforesaid he had formed no purpose or intention in regard to selecting and taking a homestead when said land should be duly opened to settlement under the aforesaid act of Congress and the proclaSmation of the President of the United States; that he has not entered upon and occupied any portion of the lands embraced in said proclamation within the meaning, letter, and spirit of said act of March 2nd, 1889, prior to 12 o'clock noon of said day, but made such entry into said Territory as aforesaid as a deputy United States marshal, and remained therein up to 12 o'clock noon on said 22nd day of April, 1889, in obedience to the orders of the United States marshal, whose jurisdiction embraced and extended over all the Territory to be opened to homestead settlement as aforesaid, and whose deputy, duly appointed and qualified, the plaintiff was at the time, and for the legal, rightful, and proper purposes aforesaid, and it was the duty and right of the plaintiff, in obedience to his aforesaid orders of his superior officer, to be and remain in said Territory as aforesaid, the commissioner of public lands having been applied to by and on behalf of persons so in the Territory as plaintiff prior to the 22nd day of April,

1889, to know if so remaining in the Territory would in any way interfere with them taking and holding a homestead under said act of Congress of March 2nd, 1889, and said commissioner of public lands, in response to such inquiry and for the information of such persons so in said Territory as United States officers in the discharge of their duties, prepared a letter directed to the Hon. John J. Ingalls, then a United States Senator, which letter was before being sent to said Ingalls submitted to the Hon. John W. Noble, then Secretary of the Interior, and approved by him, in which letter, among other things, it was distinctly stated that in the opinion of said commissioner, and which opinion had been approved by the Secretary of the Interior as aforesaid, that persons in official positions and in the Territory in discharge of
5 the duties of such positions would not be thereby disqualified from taking and holding homesteads in said Territory, and that while said law contained no exceptions such parties would not come within its spirit and purpose, nor was anything said in said letter and opinion about going outside the Territory and coming in from there on the 22nd day of April, after 12 o'clock noon of said day. The substance of said letter, with others, showing the opinion of the commissioner of public lands and the Secretary of the Interior, was embodied in a circular of instructions and information, and widely circulated before the 22nd of April, 1889, for the information of such officers and the public; and relying upon the opinion and assurances contained in said letter and circular, together with other assurances and opinions of said Secretary of the Interior, given to the Hon. William M. Springer, then a member of Congress, who, prior to the 22nd day of April, 1889, was telegraphed to by a party who was offered the position of a deputy United States marshal for said Territory, and who was unwilling to accept said office if it would deprive him of his right to take and hold a homestead when the country should under the President's proclamation be opened to settlement; and said Secretary of the Interior, in reply and answer to said inquiry, made the following response after reading the telegram of inquiry: Tell him to take said office and he would see that he was protected in his rights to acquire a homestead. Relying on these opinions and assurances, said plaintiff remained in the Territory as aforesaid, and being so rightfully in said Territory, and having all the qualifications entitling him to take and hold a homestead as aforesaid, and after 12 o'clock noon of said 22nd day of April, 1889, when,
6 under the act of Congress and the proclamation of the President issued in pursuance thereof, said lands were legally opened to all qualified homestead settlers, the plaintiff did in good faith and rightfully settle upon said tract of land as his homestead, and on the day aforesaid rightfully make his application to the United States land office at Guthrie, pay for and enter said land as aforesaid, and has ever since said settlement and entry as aforesaid been the equitable owner of said land, and had a vested equitable right therein under the Constitution and laws of the United States,

and a superior right and equity over all other persons in and to said land by reason of the premises aforesaid.

The plaintiff, further complaining, states and shows to the court that after he had went upon and made settlement upon said tract of land in the manner and at the time aforesaid and had become entitled to hold the same as his homestead by reason of his aforesaid prior, legal, and rightful settlement and entry, that various other parties entered upon said tract of land, although notified at the time of such entry that the plaintiff had made prior settlement thereon and claimed the same as his homestead and was engaged in digging a well and making other valuable improvements thereon and still resides upon and cultivates said land, so far as he has possession thereof. Among the persons so coming upon said tract of land *were* the defendant Zenophon Fitzgerald, who settled upon and claimed the same as a homestead, and numerous other parties came upon said tract of land after it had been settled upon and was occupied by plaintiff as aforesaid, and by force and over the notice and warnings of the plaintiff proceeded to stake off and
7 occupy a large part of said tract of land as a town site, in violation of law and of the prior and superior homestead right of the plaintiff.

That afterwards, to wit, on the 9th day of May, 1889, and other days, contests were filed against the plaintiff in the United States land office at Guthrie, Oklahoma, for the purpose of securing the cancellation of plaintiff's aforesaid homestead filing by the following-named parties, T. H. Soward *et al.*, who claimed to represent a town-site company and who had entered the Territory before noon on the 22nd day of April, 1889, and were hid in the brush until the hour of noon, and then came upon the land after plaintiff had settled upon it as aforesaid; that trials were had of said contest before the register and receiver of the United States land office at Guthrie, before th commissioner of public lands, and a final hearing and determin ion was had before the Secretary of the Interior on the 22nd day of June, 1891; that the Secretary ordered the homestead entry No. 4 of plaintiff's be cancelled and that the land be given to the said town-site claimants of East Guthrie, thereby affirming the ruling previously made by the commissioner of public lands cancelling said entry; that as to claim, settlement, and filing of the plaintiff the Secretary made a finding of facts and ruling, which is in the words and figures following:

"Ransom Payne made homestead entry for the N. W. ¼ of section nine (9) on April 23rd, 1889. Said Ransom Payne was a United States deputy marshal, duly appointed prior to the passage of the act of March 2nd, 1889 (16 C. L. O., 10, 11), providing for the opening of the Territory of Oklahoma to settlement, and prior to the proclamation of the President fixing the day for said open-
8 ing, and he entered said Territory prior to April 22nd, and was there at noon of that day in obedience to orders issued by his superior officer, and he was there in the discharge of his official duties. Immediately after 12 o'clock noon of April 22nd he went upon the land in question and commenced to dig a hole in

the ground for a well and as soon as practicable appeared at the local office and made his entry. So far as his age, citizenship, etc., are concerned he was a qualified homestead claimant, and he bases his claim upon his prior settlement. Your office held his entry for cancellation on the ground that he had entered the Territory prior to the time fixed in the proclamation of the President, basing said decision on the decision of the department in the case of The Town Site of Kingfisher *vs.* Wood *et al.* (11 L. D., 330; 17 C. L. O., 164, 246, 248).

Payne appeals, and his counsel earnestly contend that their client does not come within the terms of said decision, but if it should be held that he does come within its terms they ask that said decision be modified in so far as it applies to persons situated as Payne was, viz., lawfully in the Territory in the discharge of his official duties at the hour of 12 o'clock noon, April 22nd, 1889." This covers the facts so far as found and commented upon by the Secretary of the Interior in rendering his findings, rulings, and opinion in the case.

The plaintiff further states that the Secretary of the Interior in construing the act of Congress of March 2nd, 1889, under which the lands in said Territory were opened to settlement, misconstrued and misapplied the laws applicable to the following provision of the act of Congress aforesaid:

9 "And provided further, that each entry shall be in a square form as near as practicable, and no person shall be permitted to enter more than one-quarter section thereof; but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon or occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

The plaintiff further states that the Secretary of the Interior in his aforesaid ruling and findings in said case misapprehended and misconstrued the language of the proclamation of the President of the United States issued March 23rd, 1889, fixing the time when the land of said Territory, acquired as described in said proclamation, should be open for homestead settlement, and also misapprehended and misconstrued and misapplied the law to the language and provisions of said proclamation, and especially as to the following part of said proclamation, which is in words and figures following:

"Now, therefore, I, Benjamin Harrison, President of the United States, by virtue of the power in me vested by the said act of Congress approved March the second, eighteen hundred and eighty-nine, aforesaid, do hereby declare and make known that so much of the lands aforesaid acquired from or conveyed by the Muscogee (or Creek nation of Indians, and from or by the Seminole nation of Indians, respectively, *or* is contained within the following-described boundaries)" (boundaries omitted), "will at and after the hour of twelve o'clock noon of the 22nd day of April next, and not before, be open to settlement under the terms and subject to all the

10 conditions, limitations, and restrictions contained in said

act of Congress approved March 2nd, eighteen hundred and eighty-nine, aforesaid, and warning is hereby again expressly given that no person entering upon and occupying said lands before the hour of twelve o'clock noon of the twenty-second day of April, A. D. eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any right thereto, and the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect."

The plaintiff further states that the Secretary of the Interior, in this determination and in his rulings in relation to the settlement and entry of the aforesaid tract of land by the plaintiff as aforesaid, misconstrued and misapplied the law to the facts as found aforesaid, and that, under the aforesaid act of Congress and the proclamation of the President and the facts as found and admitted, the plaintiff was and is a prior settler and entryman, rightfully, legally, and equitably entitled to the aforesaid tract of land as his homestead, and the finding of the Secretary of the Interior should have been for the plaintiff and not for the settlers of the town of East Guthrie, as held by said Secretary, and to whom the said tract of land was awarded by the Secretary in violation of law and the rights of the plaintiff, he having, under a proper construction of the law and application of the same to the facts established and found, the superior equity and equity right to said tract of land, and the Secretary of the Interior erred and misconstrued the act of Congress and the proclamation of the President of the United States and all and every rule and principle of law applicable to the construction of said act of Congress and proclamation in holding said entry of com-
11 plainant for cancellation and ordering the same to be cancelled, and attempting to divest the complainant of his vested rights under the Constitution and laws of the United States, of his equitable right, interest, and title in and to said land under his homestead entry and settlement aforesaid, and in violation of every principle of law and equity on the facts aforesaid, and giving said tract of land to the town-site claimants aforesaid.

The complainant further states and shows to the court that after making the findings and rulings aforesaid the Secretary of the Interior appointed the defendants W. S. Robertson, John Foster, and A. C. Schnell as a special town-site board to prove up and enter the aforesaid tract of land, in trust for the inhabitants of the so-called town of East Guthrie, and to make and execute deeds to the occupants thereof as their respective rights and interests may appear; that said defendants, as such special town-site board, have proved up and entered said tract of land and obtained a final certificate and patent for the same, and that the legal title to said tract of land has passed from the United States and is now vested in said defendants as aforesaid.

The complainant further states that at the time and place mentioned in the notice of said commissioner to make such final proof he duly appeared before the hons. register and receiver of the United States land office at Guthrie, Oklahoma Territory, and presented proof of his residence and cultivation upon the land above

described, and tendered to said receiver the purchase price for the same, under sec. 21 of the act of May 2nd, 1890, viz., the sum of
12 $200.00, lawful money of the United States; that said proof was rejected and the said purchase-money refused "for the reason that H. E. No. 4 had been cancelled by order of the Secretary of the Interior and the land within described awarded to the town-site claimants;" "fees tendered;" that *is* a true and correct copy of said final proof and all the affidavits connected therewith, together with the rejection and refusal of money tendered, endorsed thereon, is hereto attached and hereby made a part of this complaint as fully as though the same was herein written, the same being marked Exhibit "B."

That said plaintiff has done all things required by law of him in order to be entitled to his final patent, conveying to him the full, legal, and equitable title to said land, and but for the error aforesaid of the Hon. Secretary of the Interior in misconstruing the law aforesaid the said patent would have been issued to him, the plaintiff, instead of to the said defendants, John Foster, A. C. Schnell, and W. S. Robertson, and he has by such erroneous decision and construction of the law by the Hon. Secretary been deprived of the evidence of his legal title to said land.

The complainant further states that the superior right and equity in and to said tract of land, under the Constitution and laws of the United States and under the plaintiff's aforesaid settlement and entry and the aforesaid facts as found by the Secretary of the Interior, is still in the plaintiff, and that he has never been legally, under the Constitution and laws of the United States, by the decision of any judicial tribunal, divested of his rights, title, and equity in and to said tract of land acquired as aforesaid, and that said defendants, as a town-site board aforesaid, have acquired the legal title thereto and hold the same subject to all the equities and rights of plaintiff therein; that the Secretary of the Interior misconstrued and
13 misapplied the law to the facts found by him as aforesaid; that plaintiff, being a qualified person to take and hold a homestead, and legally in said Territory as aforesaid, under the facts as found and under the rulings of the said Secretary, after twelve o'clock noon of said 22nd day of April, 1889, had a legal right to settle upon said tract of land, and did so settle upon and did so enter the same and thereby acquired a vested right in and to said tract of land and became the equitable owner thereof; and the aforesaid cancellation of his said homestead entry was and is in violation of the law and a wrongful and erroneous construction and application and interpretation of the aforesaid act of Congress and the proclamation of the President of the United States, and in violation of the rights of plaintiff under the Constitution and laws of the United States and contrary to equity and justice; and a trust in favor of the plaintiff attaches to said tract of land in equity, which the plaintiff asks to have declared and established.

The plaintiff states that no town-site settlers were on said tract of land when plaintiff inaugurated his settlement thereon as aforesaid; that by said settlement he acquired the right thereto as a

prior settler under the provisions of the act of Congress passed and approved May the 14th, 1880, and was and is the first legal and prior settler on said land, and under the provisions of the aforesaid act and the act of Congress passed and approved March 2nd, 1889, opening said land to homestead settlement, and under the homestead laws of the United States in force and effect on the 22nd day of April, 1889, and under the aforesaid homestead entry and payment for said land the plaintiff has acquired and now holds the superior equity and right to said tract of land; that plaintiff's aforesaid settlement was prior to that of the said Zenophon Fitzgerald,
14 who sets up a claim to said land as a homestead settler, and prior to that of any and all other settlers, whether claiming as town-site or homestead settlers; that said land is of the actual value of ($10,000.00) ten thousand dollars.

That said tract of land is no part of the three hundred and twenty acres on which the town of Guthrie proper is built and on which the United States land office was and is located, and was not in any manner reserved or withdrawn from homestead settlement under any law of the United States then in force, and was open and subject to settlement and entry for homestead purposes, and was so entered by the plaintiff in good faith as his homestead aforesaid.

The plaintiff further states that the said defendants, W. S. Robertson, John Foster, and A. C. Schnell, are about to commence making deeds for said tract of land to the various intruders and occupants who are claiming the same as a town site, and unless enjoined and restrained by this honorable court they will make and deliver deeds to various persons for portions thereof, thereby clouding plaintiff's right and requiring multiplicity of suits to set aside and cancel such conveyances and suit in ejectment or other action at law to dispossess them.

The plaintiff, being without any remedy at law, asks that his right, equity, and title in and to said tract of land be established; that a resulting trust be declared and established to said tract of land in favor of plaintiff; that said defendants, as a town-site board, be divested of the legal title, and that the same be vested in the plaintiff, he being ready and willing, should the court so decree, to pay the two hundred dollars for said tract of land by said town-site board and to do equity on the premises; that said town-site board be restrained and enjoined from making deeds or conveyances for any part of said tract of land to any one.

15 And on final hearing he prays for all other and further relief which to equity pertaineth and the nature and facts of the case require.

AMOS GREEN,
HARPER S. CUNNINGHAM,
Attorneys for Plaintiff, with
COPP AND LUCKET AND
J. R. HALLOWELL,
Advising Counsel.

TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

Ransom Payne, plaintiff, states that he has read the foregoing complaint and he believes the matters and things as therein stated are true.

RANSOM PAYNE.

Subscribed and sworn to before me this 1st day of February, A. D. 1893.

T. G. RISLEY, *Clerk.*

16 EXHIBIT "A."

(4–138.)

Receiver's duplicate receipt No. 4. Application No. 4.

Homestead.

RECEIVER'S OFFICE, GUTHRIE, I. T., *April 23rd*, 1889.

Received of Ransom Payne the sum of fourteen dollars — cents, being the amount of fee and compensation of register and receiver for the entry of N. W. ¼ of section 9, in township 16 N., of range 2 W., under section 2290, Revised Statutes of the United States.

$—. C. M. BARNES, *Receiver.*

NOTE.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the said five years he must file proof of his actual settlement and cultivation, failing to do which, his entry will be canceled. If the settler does not wish to remain five years on his tract he can, at any time after fourteen months, pay for it with cash or land warrants, upon making proof of settlement and cultivation from date of filing affidavit to the time of payment.

[On the margin:] Taken subject to the reservation of an acre of land in square form in the N. W. corner of the tract; also subject to S. D. S. No. 2, made by James H. Huckelberry on the 22nd day of April, 1889.

16½ [Endorsed:] Filed for record on the 24th day of Sept., 1890, at 11 o'clock a. m., and duly recorded in Book 1 of Deed Record, at page 105. Lewis H. Laws, dist. clerk, by Boles, deputy.

17 Before the United States land office.

GUTHRIE, OKLAHOMA, *Dec. 14th*, 1891.

In the Matter of the Application of JOHN FOSTER, WILLIAM S. ROBERTSON, and ANDREW C. SCHNELL to Make Final Proof of the Northwest ¼ of Sec. 9, T'p 16 N., R. 2 West.

Protest Against said Final Proof and Application to Make Commutation Entry of H. E. No. 4 at the Guthrie Land Office by Ransom Payne.

Comes now Ransom Payne, the homestead entryman who made homestead entry No. 4 for the above-described land, and hereby enters his protest against the making of said final proof by the said parties and objects thereto for the following reasons, to wit:

First. For that the said quarter section of land is now covered by his homestead entry No. 4 and the same has not been rightfully cancelled by any competent authority.

Second. For that under and by virtue of said homestead entry No. 4 and the homestead laws of the United States the said Ransom Payne is the owner and possessor of the equitable title to said land, to the exclusion of any interest whatever in the above-named parties or any other person or persons whomsoever.

Third. For that if said final proof be allowed by the register and receiver said action will cast a cloud upon the said title of the said Ransom Payne and be productive of much litigation and great hardship to him in the prosecution of his said title to said land.

Fourth. For that the action of the local land office and the Commissioner of the General Land Office and the Secretary of the Interior in holding his said entry No. 4 for cancellation is a
18 plain and palpable violation of the law and of his rights as a homestead entryman under the law, and such action is absolutely and utterly null and void and of no effect.

Wherefore the said Ransom Payne prays that the hon. register and receiver may reject said proof and deny to said applicant the right to prove and pay the purchase price of the land in question.

Affiant further prays that he may be allowed under their said notice, which is hereto attached, marked Exhibit "A," and is hereby made a part hereof, to make proof and payment for said land, as provided for by section 21 of the act of March 2nd, 1890, providing for commutations of homesteads in the Territory of Oklahoma; and to that end herewith tenders and makes a part of this protest and prayer an application to enter said land, the final affidavit required by law, and the proof of two witnesses of the facts which entitle him to make this final proof, and the same is hereto attached and marked Exhibit "B;" and the said Ransom Payne also herewith tenders the sum of $200.00 as the purchase price of said land and the fees and commissions of the register and receiver in addition thereto.

RANSOM PAYNE.

Ransom Payne, being first duly sworn, says that all the foregoing

statements of facts are true; that all the foregoing inferences and deductions he believes to be true.

RANSOM PAYNE.

Subscribed and sworn to Dec. 14, 1891.

JOHN I. DILLE, *Register.*

19 EXHIBIT "A."

Notice of Intention to Make Proof on Application to Enter the Town Site of East Guthrie.

UNITED STATES LAND OFFICE,
GUTHRIE, OKLAHOMA, *December* 7, 1891.

Notice is hereby given that the undersigned, John Foster, William S. Robertson, and Andrew C. Schnell, as trustees appointed under and by virtue of an act of Congress approved May 14th, 1890, and assigned by the honorable Secretary of the Interior to East Guthrie, in said Territory, did, on the 7th day of December, 1891, file in the land office at Guthrie, Oklahoma, an application to enter the west half of section nine, township sixteen north, of range two west, of the Indian meridian, as a town site for the use and benefit of the several occupants thereof, according to their respective interests, under the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," and the acts supplemental thereto, including the act of May 14th, 1890; that on said application a hearing has been ordered and set for December 14, 1891, at 9 o'clock a. m., and to be continued from day to day until completed, at which time evidence will be admitted relating—

First. To the municipal occupation of such land.

Second. Number of inhabitants.

Third. Extent and value of town improvements.

Fourth. Date when land was first used for town-site purposes and the continuance of such use.

20 Fifth. Non-mineral character of such land.

The following persons are named as witnesses: Thomas A. Stockslager, Charles A. Berger, Frank Olsmith, Samuel W. Watkins, all of Guthrie, Oklahoma Territory.

JOHN FOSTER.
WILLIAM S. ROBERTSON,
ANDREW C. SCHNELL, *Trustees.*
C. M. BARNES, *Receiver.*

Filed Feb. 2nd, 1892.

T. G. RISLEY,
Clerk Dist. Court.

21 EXHIBIT.

LAND OFFICE AT GUTHRIE, O. TY., *December* 14, 1891.

I, Ransom Payne, of Guthrie, county Logan, do hereby apply to purchase the northwest quarter (¼), section nine (9), in township

sixteen (16), of range two (2) W., containing 160 acres, according to the returns of the surveyor general, for which I have agreed with the register to give at the rate of $1.25, one dollar and twenty-five cents, per acre.

RANSOM PAYNE.

Fees and purchase price tendered and refused.

C. M. BARNES, *Receiver.*

Filed Feb. 2nd, 1892.

T. G. RISLEY,
Clerk Dist. Court.

22 (To be used in cases of commuted homestead entries in Oklahoma Territory.)

Affidavit Required of Claimant.

(Section 21 of act of May 2, 1890.)

I, Ransom Payne, claiming the right to commute, under section 21 of the act of May 2, 1890 (Statutes First Session, Fifty-first Congress, page 81), my homestead entry No. 4, made upon the northwest quarter of section nine, township sixteen, range two west, do solemnly swear that said lands or any part thereof are not occupied, required, or intended for town-site purposes, except by certain trespassers who are doing so without his consent, and that said entry, in whole or in part, is not made for the benefit of any other person, persons, or corporation, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, for town-site or other purposes; that I have not directly or indirectly made nor is it my present intention to make any agreement or contract in any way or manner with any person or persons, corporation, or syndicate whatsoever, except as provided in section 2288 of the Revised Statutes, by which the title which I may acquire from the Government of the United States shall inure in whole or in part to the benefit of any person except myself.

RANSOM PAYNE.

Subscribed and sworn to before me this 14th day of December, 1891.

JOHN I. DILLE, *Register.*

Filed Feb. 2nd, 1892.

T. G. RISLEY,
Clerk Dist. Court.

23 (4–369.)

Homestead Proof. Testimony of Witness.

JAMES O. SEVERNS, being called as witness in support of the homestead entry of Ransom Payne for N. W. ¼ sec. 9, 16, 2 W., testifies as follows:

Ques. 1. What is your name, age, and post-office address?

Ans. Guthrie, O. Ty.

Ques. 2. Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. Yes.

Ques. 3. Is said tract within the limits of an incorporated town or selected site of a city or town or used in any way for trade or business?

Ans. Yes; East Guthrie embraces it.

Ques. 4. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land.

Ans. Good, arable farming land.

Ques. 5. When did claimant settle upon the homestead and at what date did he establish actual residence thereon?

Ans. April 22, 1889; built a house soon after, about May 11, 1889.

Ques. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. I know nothing of his family. He has resided on the land, to my knowledge, since the opening of the country for settlement.

Ques. 7. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and, if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. His residence has been continuous except temporary absences for short periods, performing the duties of a United States marshal's deputy.

Ques. 8. How much of the homestead has the settler cultivated and for how many seasons did he raise crops thereon?

Ans. About 10 acres; raised crops for three years.

Ques. 9. What improvements are on the land and what is their value?

Ans. 1 house 12 x 14, 1 house 8 x 12, well, and fencing, all of the value of $185.00.

Ques. 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. None.

Ques. 11. Has the claimant mortgaged, sold, or contracted to sell any portion of said homestead?

Ans. Not to my knowledge.

Ques. 12. Are you interested in this claim, and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. I am not. I think he is acting in good faith.

JAMES O. SEVERNS.

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 14 day of Dec., 1891.

JOHN I. DILLE, *Reg.*

(See note on fourth page.)

(The testimony of witnesses must be taken at the same time and place and before the same officer as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, description of land, or otherwise.)

24 & 25 (4–369.)

Homestead Proof. Testimony of Witness.

RICHARD J. STUMPFF, being called as witness in support of the homestead entry of Ransom Payne for N. W. ¼ sec. 9, 16, 2 W., testifies as follows:

Ques. 1. What is your name, age, and post-office address?

Ans. Richard J. Stumpff.

Ques. 2. Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. Yes.

Ques. 3. Is said tract within the limits of an incorporated town or selected site of a city or town or used in any way for trade or business?

Ans. Yes; part of East Guthrie.

Ques. 4. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land.

Ans. Good arable land.

Ques. 5. When did claimant settle upon the homestead and at what date did he establish actual residence thereon?

Ans. He was residing upon said land when I came to Oklahoma on April 27th, 1889, and has resided there ever since.

Ques. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. I know nothing of his family; he himself has been residing on the land ever since the opening of the country to settlement.

Ques. 7. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and, if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. His residence has been continuous; he has been temporarily

absent, performing the duties of U. S. deputy marshal, for short periods of time.

Ques. 8. How much of the homestead has the settler cultivated and for how many seasons did he raise crops thereon?

Ans. He has enclosed about ten acres with wire fence and has raised crops on a portion thereof for three years.

Ques. 9. What improvements are on the land and what is their value?

Ans. One house 12 x 14, one house 8 x 12, one well, ten acres fenced, some breaking.

Ques. 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. None.

Ques. 11. Has the claimant mortgaged, sold, or contracted to sell any portion of said homestead?

Ans. Not to my knowledge.

Ques. 12. Are you interested in this claim, and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. I am not. He is acting in good faith.

RICHARD J. STUMPFF.

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 14 day of Dec., 1891.

JOHN I. DILLE, *Reg.*

(See note on fourth page.)

(The testimony of witnesses must be taken at the same time and place and before the same officer as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, description of land, or otherwise.)

26 (4–369.)

Homestead Proof. Testimony of Witness.

HARPER J. CUNNINGHAM, being called as witness in support of the homestead entry of 4 for Ransom Payne, testifies as follows:

Ques. 1. What is your name, age, and post-office address?

Ans. Harper J. Cunningham.

Ques. 2. Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. Yes.

Ques. 3. Is said tract within the limits of an incorporated town or selected site of a city or town or used in any way for trade or business?

Ans. Yes; part of East Guthrie is located on it.

Ques. 4. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land.

Ans. Good arable land, suitable for farming.

Ques. 5. When did claimant settle upon the homestead and at what date did he establish actual residence thereon?

Ans. He built his residence and has lived upon the land continuously since July 1st, 1889.

Ques. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. He has resided there himself continuously. I know nothing of his family.

Ques. 7. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and, if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. Only for short periods, attending to his business of U. S. deputy marshal.

Ques. 8. How much of the homestead has the settler cultivated and for how many seasons did he raise crops thereon?

Ans. He has enclosed about ten acres and has raised crops thereon for three seasons.

Ques. 9. What improvements are on the land and what is their value?

Ans. One house 12 x 14, one house 8 x 12, wire fence, well, etc.; all of the value of about $185.00.

Ques. 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. None.

Ques. 11. Has the claimant mortgaged, sold, or contracted to sell any portion of said homestead?

Ans. Not to my knowledge.

Ques. 12. Are you interested in this claim, and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. I am not. I think he is acting in good faith.

HARPER J. CUNNINGHAM.

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 14 day of Dec., 189–.

JOHN I. DILLE, *Reg.*

(See note on fourth page.)

(The testimony of witnesses must be taken at the same time and place and before the same officer as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, description of land, or otherwise.)

27 (4–369.)

Homestead Proof. Testimony of Claimant.

RANSOM PAYNE, being called as a witness in his own behalf in support of homestead entry No. 4, for northwest quarter sec. 9, T. 16, R. 2 W., testifies as follows:

Ques. 1. What is your name, age, and post-office address?

Ans. Ransom Payne.

Ques. 2. Are you a native-born citizen of the United States; and, if so, in what State or Territory were you born?*

Ans. Yes; born in Wapello Co., Iowa.

Ques. 3. Are you the identical person who made homestead entry No. 4 at the Guthrie land office on the 23rd day of April, 1889, and what is the true description of the land now claimed by you?

Ans. Northwest quarter of section No. nine (9), township No. 16 N., of R. No. 2 W., I. M. I am the same person.

Ques. 4. When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. I staid continuously on the land from the 22nd of April, 1889, and on the 11th day of May erected a house 12 x 14, one room; the other 8 x 12; value, $75.00; 10 acres fenced with good post-and-wire fence; value, including labor, $100. A well cost $10.00.

Ques. 5. Of whom does your family consist, and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans. Wife and little daughter. They have not resided with me on the land for the reason that my wife is a confirmed invalid and would not remove to the land. Newport, Ky., is her residence.

Ques. 6. For what period or periods have you been absent from the homestead since making settlement and for what purpose, and, if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans. My residence upon the land has been continuous. I have been absent at different times, attending to my duties as U. S. deputy marshal, for short periods.

Ques. 7. How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

Ans. All that has not been occupied by trespassers; about 10 acres. I have raised crops thereon for three seasons.

Ques. 8. Is your present claim within the limits of an incorporated town or selected site of a city or town or used in any way for trade and business?

(* In case the party is of foreign birth a certified transcript from the court records of his declaration of intention to become a citizen or of his naturalization, or a copy thereof certified by the officer taking this proof, must be filed with the case. Evidence of naturalization is only required in final (five-year) homestead cases.)

Ans. Yes; a large portion is settled upon by trespassers for town-site purposes.

Ques. 9. What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality and for what purpose it is most valuable.

Ans. Good arable land, suitable for farming.

Ques. 10. Are there any indications of coal, salines, or minerals of any kind on the land? (If so, describe what they are and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. None.

Ques. 11. Have you ever made any other homestead entry? (If so, describe the same.)

Ans. S. W. ¼ sec. 2, T. 29, R. 33 W., 6th P. M., Kns., which I commuted at the Garden City land office.

Ques. 12. Have you sold, conveyed, or mortgaged any portion of the land; and, if so, to whom and for what purpose?

Ans. I have not.

Ques. 13. Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same and state where the same is kept.)

Ans. One horse, household effects, stock of oats kept on claim, and none elsewhere.

RANSOM PAYNE.

I hereby certify that the foregoing testimony was read to the claimant before being subscribed, and was sworn to before me this 14 day of December, 1891.

JOHN I. DILLE, *Reg.*

(See note on fourth page.)

28 [Endorsed:] (4–369.) Protest homestead proof of Ransom Payne. Land office at Guthrie, O. T'y. Original application No. 4. Final certificate No. —. Rejected for the reason that H. E. No. 4 has been cancelled by order of the Secretary of the Interior and the land within described awarded to the town-site claimants. Fees tendered. John I. Dille, register. C. M. Barnes, receiver. No. —. Received for filing Dec. 15, 1891, at Guthrie office, Ind. Ter.

NOTE.—The officer before whom the testimony is taken should call the attention of the witness to the following section of the Revised Statutes and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

Title LXX. Crimes. Ch. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testi-

mony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See § 1750.)

Final Affidavit Required of Homestead Claimants.

Section — of the Revised Statutes of the United States.

I, Ransom Payne, having made a homestead entry of the 4 N. W. ¼ section No. 9, in township No. 16 N., of range No. 2 W., subject to entry at Guthrie under section No. 2289, act of May 14, 1890, of statutes of the United States, do now apply to perfect my claim thereto by virtue of section No. 21, act of May 2, 1890, of statutes of the United States, and for that purpose do solemnly swear that I, Ransom Payne, am a citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said land since the 22 day of April, A. D. 1889, to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegiance to the Government of the United States, and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States, except a certain commutation proof for S. W. ¼ sec. 2, T. 29, R. 33 W., 6th P. M., at Garden City, L. D., Kns.

RANSOM PAYNE.

I, John I. Dille, of Guthrie, O., K., do hereby certify that the above affidavit was subscribed and sworn to before me this 14 day of Dec., 1891.

JOHN I. DILLE, *Reg.*

29 TERRITORY OF OKLAHOMA, *Logan County.*

In the District Court.

RANSOM PAYNE
vs.
W. S. ROBERTSON, JOHN FOSTER, ANDREW C. SCHNELL, XENOPHON FITZGERALD. } Demurrer.

Demurrer of W. S. Robertson, John Foster, and A. C. Schnell.

W. S. Robertson, John Foster, and A. C. Schnell, defendants in the above-entitled action, demur to the complaint herein for the reason that the court has no jurisdiction of the person of the defendants.

II.

Defendants demur to the complaint for the reason that the court has no jurisdiction of the subject of the action.

III.

Defendants demur to the complaint for the reason that there is a defect of parties defendant, to wit, each and every the lot claimants in and upon the northwest quarter of section 9, township 16, range 2 west, described in the complaint.

IV.

Defendants demur to the complaint for the reason that it does not state cause sufficient to constitute a cause of action.

V.

Defendants demur to said complaint for the reason that several causes of action are improperly joined therein.

30 NOTE.—The objections to the complaint in this cause are substantially the objections to the complaint in the case of Veeder B. Payne *vs.* these defendants and the case of Xenophon Fitzgerald *vs.* these defendants. The difference, however, in the objections in those cases and the complaint in this case shows that Ransom Payne entered Oklahoma Territory as a deputy U. S. marshal under the act of Congress and the proclamation of the President of the United States under which the country was opened and prior to noon of April 22nd, 1889, and that while in the Territory he considered the question of taking a homestead in the Territory and was conversant with all the questions raised by himself and others whether being in the Territory before the opening would disqualify him from taking a homestead. The complaint asserts that because of assurances which others received from the officials of the Government that he determined not to go out of the Territory, but to remain in the country and take up his claim after noon of April 22, the day of the opening; that under these conditions he remained in the Territory as marshal, executing the duties of his office, until 12 o'clock noon of the day, at which time he immediately entered upon said quarter section of land and claimed the same as his homestead; that on the day thereafter he made entry at the land office; that thereafter, at a date not stated, he begun a house on the land and enclosed a part of the land, but whether it was a few feet or a few inches or whatever quantity he enclosed does not appear; he does not pretend, however, that he enclosed all of the land or attempted to do so; that he began
31 on the 22nd of April to dig a well, but whether he ever continued or for what purpose he began the well, or whether he began it in good faith, does not appear, nor does it appear that the well was ever completed.

Plaintiff does not claim that he was the first settler upon the land,

nor does he claim that the land was not at the time he went upon it occupied for town-site purposes.

The complaint does not pretend that the plaintiff waited a sufficient length of time after noon to give other persons who started from the north line of the Territory at noon of the opening day, and, using due diligence, time to reach the land by the time he entered thereon.

The court will take judicial cognizance of the matter of the distance it is from the outer line of the Territory opened and of the fact that the plaintiff must have known at the time he went upon the land that it was impossible for the persons starting fairly from the outer lines to reach the land in controversy by the time he would enter thereon. The court must therefore take judicial cognizance of the fact that the plaintiff had by reason of his official position and being in the country an unfair advantage of persons not in official positions, who were held out of the country by act of Congress and the President's proclamation. It has been repeatedly decided that persons in the Territory by reason of their official positions are within the purview of the act of Congress and the
32 President's proclamation and will not be permitted to avail advantages open to them by reason of their official position, and thus outstrip citizens, not officers, held at the outer line until noon of the opening day.

HORACE SPEED,
United States Attorney.

33 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

September Term, 1893, First Judicial District, Logan County, Number 898, United States District Court.

RANSOM PAYNE
vs.
JOHN FOSTER *et al.*

Be it remembered that on this the 9th day of January, A. D. 1893, this case came up for determination on defendants' demurrer filed herein. The court having at a prior time heard all the arguments of the plaintiff'- and defendants' attorneys on defendants' demurrer to plaintiff's bill filed herein, and the court, being fully and sufficiently advised in the premises, does now order and adjudge that the said demurrer of the defendants be, and hereby is, sustained; and it is further ordered and adjudged and decreed by the court aforesaid that the said plaintiff's bill filed in said case be, and the same hereby is, dismissed at the cost of the said plaintiff. To this order and decree of the court the plaintiff does now, by his attorney, except, and prays an appeal to the supreme court of the Territory of Oklahoma; whereupon the court does now grant the said appeal, as prayed by the said plaintiff, to the supreme court of said Territory, and does hereby fix appellant's appeal bond in the sum of two hundred dollars ($200.00), and orders that the said bond

be filed by January 14th, subject to the approval of the clerk of this court.

—— ——, *Judge.*

—— ——, *Clerk.*

34 (Original.)

Appeal Bond, District Court.

Know all men by these presents that we, Ransom Payne, as principal, and Harper S. Cunningham and Veeder B. Paine, residents of Logan county, Oklahoma Territory, as sureties, are held and firmly bound unto the clerk of the supreme court of the Territory of Oklahoma in the penal sum of two hundred dollars ($200.00); for the payment of, which, well and truly to be made, we do hereby bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Signed and dated this 11th day of January, A. D. 1893.

Whereas on the ninth day of January, 1893, Ransom Payne, of the city of Guthrie, Oklahoma Territory, did pray and was by the Hon. E. B. Green, judge of the district court, granted an appeal to the supreme court of said Territory from the judgment rendered in the said district court in the case of Ransom Payne *vs.* John Foster *et al.*, wherein the said Ransom Payne was plaintiff and John Foster *et al.* defendant-, wherein the said Ransom Payne had filed his bill praying for a decree from the said district court commanding the said John Foster *et al.* to make and deliver to him a deed to the northwest ¼ of section 9, township 16, range 2 west:

Now, therefore, the condition of this obligation is such that if the above-bounden plaintiff shall pay or cause to be paid all costs that may be adjudged against him and to pay the same provided they cannot be collected otherwise in the above-named court or any court to which his said appeal may be carried, then this obligation

35 to be void; otherwise to remain in full force and effect.

(Signed) RANSOM PAYNE.
HARPER S. CUNNINGHAM.
VEEDER B. PAINE.

Filed and approved by me this 11th day of January, 1893.

THEODORE G. RISLEY,
Clerk U. S. District Court.

(Endorsed on back:) Filed January 11th, 1893. Theodore G. Risley, clerk.

36 TERRITORY OF OKLAHOMA, } ss:
County of Logan. }

In the District Court.

RANSOM PAYNE, Plaintiff,
vs.
JOHN FOSTER *et al.*, Defendants. } Præcipe for Transcript.

To the clerk:

Please make transcript of the record in this case, including the following, viz:

The complaint, demurrer to complaint, the decree of the court, and the bond for appeal.

AMOS GREEN &
HARPER S. CUNNINGHAM,
Attorneys for Plaintiff.

37 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, Logan County, }

In the District Court of said County.

I, Theodore G. Risley, clerk of the United States district court and the district court of Logan county within and for the first judicial district of Oklahoma Territory, do hereby certify that the attached and foregoing is a true, perfect, correct, and complete copy of the original complaint, together with the exhibits thereto attached, the demurrer, decree of the court, appeal bond, and the præcipe, now on file and of record in my office, in the city of Guthrie, in the case of Ransom Payne *vs.* John Foster *et al.*, as the same was ordered by a written præcipe filed by Harper S. Cunningham on the 9th day of January, A. D. 1893, attorney for Ransom Payne, appellant in said action.

Witness my hand and the seal of said court, at my office, in the city of Guthrie, this 11th day of January, A. D. 1893.

THEODORE G. RISLEY,
Clerk District Court.

38 TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

In the Supreme Court for the Territory Aforesaid, of the June Term, 1893.

RANSOM PAYNE (Appellant)
against
JOHN FOSTER *et al.* (Appellees). } Assignment of Errors.

And now comes the appellant and makes the following assignment of errors, which intervened in the trial of the above-entitled case in the district court of the first judicial district, sitting within and for said county of Logan, at the September term, 1892, of said

court, and on the 9th day of January, A. D. 1893, of said term, when said cause came on to be heard on plaintiff's (here appellant's) said complaint and exhibits thereto attached and the demurrer interposed by the defendants (here appellees) to said complaint, and upon which assignment of errors he asks that the judgment of the court below sustaining said demurrer and dismissing plaintiff's (here appellant'-) said bill of complaint and rendering judgment against him for costs be reversed and set aside, and that the case be remanded to the court below, with directions to overrule said demurrer.

39 First. The court below erred in sustaining the demurrer to plaintiff's said complaint, and in dismissing the plaintiff's (here appellant's) said complaint and rendering judgment against him for costs.

Second. The demurrer admits that the appellant came into the Oklahoma country as a deputy marshal of the United States, in the rightful discharge of his duties as such deputy marshal and in obedience to the instructions of his superior officer, the United States marshal for the district of Kansas, which said district embraced the territory to be opened on the 22nd day of April, 1889, at twelve o'clock noon of said day.

That at said hour when said lands described in appellant's complaint were opened to settlement, at the hour and on the day aforesaid, the appellant was duly and legally qualified to take and hold a homestead in said lands so opened to settlement, and that after said hour when said lands were duly opened he did go upon the tract of land described in his said complaint and make settlement thereon as his homestead; that he was the first and prior settler on said tract of land, and that at the time he went upon it and made said settlement it was open to settlers and subject to entry as a homestead.

That on the 23rd day of April, 1889, at the United States land office located at Guthrie, in said Territory, he duly entered said tract of land as his homestead, and paid the Government dues and price therefor, and received the duplicate receipt of the register of said land office; that since his said settlement and entry as

40 aforesaid of said tract of land he has resided upon and improved the same as his homestead, and still so resides upon it, and has in all respects complied with the requirements of the homestead laws; that he, after one year's residence thereon, made due proof before the register and receiver of the United States land office at Guthrie, Oklahoma — tendered to the receiver the commutation price of said land, one dollar and twenty-five cents per acre, and all legal fees; on which admitted facts under the laws the appellant has the superior equity and right to said tract of land, and the court erred upon the aforesaid admitted facts in not overruling the defendants' said demurrer to the said complaint, and in dismissing said bill of complaint and rendering judgment for costs against this appellant.

Third. The court below erred in holding that the allegations contained in appellant's said bill of complaint were not sufficient in law

and equity to entitle said appellant to the relief prayed for in said complaint, and in sustaining appellees' demurrer to the same.

Fourth. The court below erred in holding that on the facts as set out in the complaint the appellant was not a competent and qualified entryman of said land.

Fifth. Under the act of Congress of March 2nd, 1889, and the proclamation of the President, issued in pursuance thereof, it requires both an entry and an occupancy of some tract or parcel of the land to be opened under said act to disqualify any person from ever taking a homestead or acquiring any rights under said
41 law, and on the facts set out in appellant's said complaint and admitted by the demurrer of appellees the appellant was a duly qualified entryman, never having, as alleged in said complaint, in any manner violated the provisions of said act of Congress, and the court erred in sustaining said demurrer.

Sixth. The appellant's presence in said Territory during the prohibited period as an officer of the United States and in the discharge of his duty was not a violation of the act of Congress of March 2nd, 1889, or any other act of Congress; the officers of the United States whose duties required their presence being that of the Government is not embraced in said prohibitory clause of said act, and such presence and entry was and is no violation of any provision of said act and creates no disqualification whatever, and the appellant, on the admitted allegations of said complaint, being in no manner disqualified and having violated no provision of the said act in being in said Territory in discharge of his official duties as a United States deputy marshal.

The court below erred in not overruling said demurrer and in sustaining the same.

AMOS GREEN & SON &
HARPER S. CUNNINGHAM,
Att'ys for Appellant.

42 To T. G. Risley, clerk, for making transcript, 8,900 words at 10 cents per folio..... $8 90
Drafting and executing appeal bond..... 50
Certificates to transcript..... 25

Total..... $9 65

(Endorsed on back:) Transcript. Ransom Payne *vs.* John Foster *et al.* Transcript and assignment of errors. Filed June 1, 1893. C. H. Filson, clerk. Amos Green & Son & Harper S. Cunningham, att'y- for appellant.

43 TERRITORY OF OKLAHOMA:

In the Supreme Court.

RANSOM PAYNE
vs.
JOHN FOSTER, WILLIAM S. ROBERTSON, and A. C. SCHNELL *et al.*, Defendants. } Joinder in Error.

The defendants John Foster, William S. Robertson, and A. C. Schnell for answer to the petition in error herein say that there is no error in the proceedings in the court below.

HORACE SPEED,
Attorney for Defendants.

(Endorsed on back:) Supreme court. Ransom Payne *vs.* John Foster *et al.*, town-site trustees. Answer in error. Filed June 27, 1893. C. H. Filson. Horace Speed, U. S. att'y, for def'ts.

44 UNITED STATES OF AMERICA, } *Territory of Oklahoma.* }

Be it remembered that on the twenty-third day of June, in the year of our Lord one thousand eight hundred and ninety-three, the supreme court of the Territory of Oklahoma met in the city of Guthrie, the same being the fifth day of the June term of said court.

There were present Hon. E. B. Green, chief justice; Hon. John H. Burford and Hon. Frank Dale, associate justices; Horace Speed, Esq., United States attorney, attorney for the Territory; J. F. Stone, Esq., ass't United States attorney; William Grimes, marshal; Chas. H. Filson, clerk, and R. C. Blue, crier.

Public proclamation of the opening of the court being made by the crier, the following (among other) proceedings were had:

RANSOM PAYNE, Appellant,
vs.
JOHN FOSTER *et al.*, Appellees. } No. —.

And now comes John F. Stone, Esq., counsel for appellees, and moves the court that a rule be entered against appellants herein, requiring them to answer; thereupon a rule was entered and appellants were given until June 28, 1893, in which to file answer; and, further, that on June thirtieth, 1893, being also one of the judicial days of the June term of said court, this cause came
45 on for decision, it being agreed by the parties hereto that this cause be submitted for the consideration of the court on the transcript of the record and errors therein assigned, without argument and without the filing of briefs; thereupon the court made the following order, to wit:

RANSOM PAYNE, Appellant,
v.
JOHN FOSTER, W. S. ROBERTSON, A. C. SCHNELL, and XENOPHON FITZGERALD, Appellees.
} Appeal from Logan.

Per Curiam:

This was a bill in chancery, in the district court of Logan county, brought by appellant against the appellees, for the purpose of obtaining title to the northwest quarter of section nine, township sixteen, range two west, being a part of the town site of what was formerly East Guthrie and now included in the town site of the city of Guthrie, in the county of Logan and Territory of Oklahoma.

A demurrer was interposed in the court below, raising the question of the qualification of appellant as a homestead entryman under the act of Congress of March 2, 1889, and was sustained to
46 appellant's bill of complaint, and a decree was rendered on the demurrer dismissing the bill at appellant's costs and wholly denying the relief prayed for, and the record is brought into this court by appeal and the action of the court below on the demurrer is assigned for error.

This case is in some particulars similar to the case of Smith *v.* Townsend, 1 Oklahoma Rep., 117. Appellant was a deputy United States marshal and in the line of duty at 12 o'clock noon of April 22, 1889, and claims that he is not disqualified by reason of being within the limits of the lands which were opened to settlement by the proclamation of the President at that hour; but in the same case of Smith *v.* Townsend, recently heard and affirmed in the Supreme Court of the United States, in the construction of the acts of Congress of March first and second, 1889, that court has brought appellant within the disqualifying provisions of those acts, and it must be so held by this court upon the authority of that case, and the decree of the district court will be affirmed, with costs.

Decree Affirmed.

RANSON PAYNE, Appellant,
vs.
JOHN FOSTER *et al.*, Appellees.

And now, on this day, it being the 30th day of June, A. D. 1893, and one of the judicial days of the June term of this court, the parties appeared by their respective attorneys, and, the court having heretofore taken this cause under advisement, it is considered by the court that the judgment and decree of the district court of Logan county be, and the same is, in all things affirmed, and that the appellant in this cause pay the costs of this court, to be taxed by the clerk, and thereof let execution issue.

To which judgment the appellant then and there excepted and prayed an appeal to the Supreme Court of the United States; which prayer was granted, conditioned upon the filing by appellant of a

bond in the sum of five hundred dollars, with sureties to be approved by the clerk of the court. Thirty days was allowed appellant in which to perfect said appeal.

47 TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

In the Supreme Court for the Territory Aforesaid, of the June Term, 1893.

RANSOM PAYNE, Appellant, }
against } Assignment of Errors.
JOHN FOSTER *et al.*, Appellees. }

And now comes the appellant and makes the following assignment of errors which intervened on the trial and hearing of the above-entitled cause in the supreme court of said Territory, and upon which assignment of errors he asks that the judgment of the said supreme court be reversed and set aside, and that the case be remanded:

48 First. The court below erred in sustaining the demurrer to plaintiff's said complaint and in dismissing the plaintiff's (here appellant's) said complaint and rendering judgment against him for costs.

Second. The demurrer admits that the appellant came into the Oklahoma country as a deputy marshal of the United States in the rightful discharge of his duties as such deputy marshal and in obedience to the instructions of his superior officer, the United States marshal for the district of Kansas, which said district embraced the Territory to be opened on the 22nd day of April, 1889, at twelve o'clock noon of said day.

That at said hour when said lands described in appellant's complaint were opened to settlement, at the hour and on the day aforesaid, the appellant was duly and legally qualified to take and hold a homestead in said lands so opened to settlement, and that after said hour when said lands were so duly opened he did go upon the tract of land described in his said complaint and make settlement thereon as his homestead; that he was the first and prior settler on said tract of land, and that at the time he went upon it and made said settlement it was open to settlers and subject to entry as a homestead.

That on the 23rd day of April, 1889, at the United States land office located at Guthrie, in said Territory, he duly entered said tract of land as his homestead and paid the Government dues and price therefor and received the duplicate receipt of the register of said land office; that since his said settlement and entry as aforesaid of said tract of land he has resided upon and improved the same as his homestead, and still so resides upon it, and has
49 in all respects complied with the requirements of the homestead laws; that he, after one year's residence thereon, made due proof before the register and receiver of the United States land

office at Guthrie, Oklahoma, — tendered to the receiver the commutation price of said land, one dollar and twenty-five cents per acre, and all legal fees; on which admitted facts, under the laws, the appellant has the superior equity and right to said tract of land, and the court erred upon the aforesaid admitted facts in not overruling the defendants' said demurrer to the said complaint and in dismissing said bill of complaint and rendering judgment for costs against this appellant.

Third. The court below erred in holding that the allegations contained in appellant's said bill of complaint were not sufficient in law and equity to entitle said appellant to the relief prayed for in said complaint, and in sustaining appellees' demurrer to the same.

Fourth. The court below erred in holding that on the facts as set out in the complaint the appellant was not a competent and qualified entryman of said land.

Fifth. Under the act of Congress of March 2nd, 1889, and the proclamation of the Presidents issued in pursuance thereof, it requires both an entry and an occupancy of some tract or parcel of the land to be opened under said act to disqualify any person from even taking a homestead or acquiring any rights under said law, and on the facts set out in appellant's said complaint and admitted by the demurrer of appellees the appellant was a duly qualified entryman, never having, as alleged in said complaint, in any manner violated the provisions of said act of Congress, and the court erred in sustaining said demurrer.

50

Sixth. The appellant's presence in said Territory during the prohibited period as an officer of the United States and in the discharge of his duty was not a violation of the act of Congress of March 2nd, 1889, or any other act of Congress, the officers of the United States whose duties required their presence being that of the Government is not embraced in said prohibitory clause of said act, and such presence and entry was and is no violation of any provision of said act and creates no disqualification whatever, and the appellant on the admitted allegations of said complaint being in no manner disqualified and having violated no provision of the said act in being in said Territory in discharge of his official duties as a United States deputy marshal.

The court below erred in not *oeve*-ruling said demurrer and in sustaining the same.

[Endorsed:] Ransom Payne *vs.* John Foster *et al.* Assignment of errors in supreme court.

51

Know all men by these presents that we, Ransom Payne, as principal, and Vedar B. Paine, as surety, are held and firmly bound unto W. S. Robertson, John Foster, A. C. Schnell, and Xenophon Fitzgerald in the full and just sum of five hundred dollars ($500), to be paid to the said W. S. Robertson, John Foster, A. C. Schnell, and Xenophon Fitzgerald, their heirs, executors, administrators, or assigns; to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of July, 1893.

Whereas lately, at the June term of the supreme court of the Territory of Oklahoma, in a suit depending in said court between Ransom Payne, plaintiff, and W. S. Robertson, John Foster, A. C. Schnell, and Xenophon Fitzgerald, defendants, judgment was rendered against the said Ransom Payne, and the said Ransom Payne has taken an appeal from the aforesaid court to reverse the judgment in the aforesaid suit to the Supreme Court of the United States:

Now, the condition of the above obligation is such that if the said Ransom Payne shall prosecute said appeal to effect and answer all costs if he fail to make good said appeal, then the above obligation to be void; else to remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals this 28 day of July, 1893.

RANSOM PAYNE. [SEAL.]
VEEDER B. PAINE. [SEAL.]
—— ——. [SEAL.]

Approved July 28, 1893.
CHAS. H. FILSON, *Clerk.*

52 (Endorsed on back:) Ransom Payne *vs.* W. S. Robertson, John Foster, A. C. Schnell, and Xenophon Fitzgerald. Filed July 28, 1893. C. H. Filson, clerk. Appeal bond.

53 UNITED STATES OF AMERICA, }
Territory of Oklahoma. }

I, Chas. H. Filson, clerk of the supreme court of the Territory of Oklahoma, certify the foregoing to be a full, true, and complete copy of the record, files, and orders of this court as the same appears on file and on the records of the court.

Seal Supreme Court, Territory of Oklahoma.

Witness my hand and the seal of the court. Done at Guthrie this 28th day of July, A. D. 1893.

CHAS. H. FILSON,
Clerk Supreme Court.

Endorsed on cover: Case No. 15,618. Oklahoma Territory supreme court. Term No., 126. Ransom Payne, appellant, *vs.* W. S. Robertson, John Foster, A. C. Schnell, and Xenophon Fitzgerald. Filed July 2, 1894.

RANSOM PAYNE, Appellant,

vs.

W. S. ROBERTSON, et al., Appellees.

No. 36.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA TERRITORY.

BRIEF OF APPELLANT.

HENRY E. COPP,
S. D. LUCKETT,
Attorneys for Appellant.

JOHN W. DANIEL,
AMOS GREEN,
Of Counsel.

WASHINGTON, D. C.:
HARTMAN & CADICK, PRINTERS.
1897.

IN THE

Supreme Court of the United States.

October Term, 1897.

RANSOM PAYNE, Appellant,

vs.

W. S. ROBERTSON, et al., Appellees.

No. 20.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA TERRITORY.

BRIEF OF APPELLANT.

THE CASE STATED.

The appellant sued the appellees in equity in the first judicial district court, sitting within and for Logan County, Oklahoma, for the March term, 1892, of said court, setting forth substantially the following facts in his complaint:

That plaintiff is a citizen of the United States and a resident of Logan County, in Oklahoma Territory; that prior to March 2 and to April 22, 1889, he had been appointed and duly qualified a U. S. deputy marshal for the district of Kansas, to which district that portion of Indian Territory now known as Oklahoma, was attached for judicial purposes; that after the passage of

the act of March 2, 1889, providing for the opening of certain Oklahoma lands, and after the issuance of the President's proclamation of March 23, 1889, fixing the date for opening said lands, plaintiff was ordered by the U. S. Marshal for said judicial district of Kansas, his superior officer, to go to the locality of the U. S. land office at Guthrie, Okla., and in obedience to said order of his superior officer and in the discharge of his duty as deputy marshal he did go to Guthrie and at noon of April 22, 1889, was at or near the U. S. land office at that point for the purpose of maintaining peace. Plaintiff, being so at Guthrie in discharge of his official duty and being duly qualified to take a homestead under the land laws of the United States, did, after 12 o'clock, noon, of said day, go upon a certain quarter section (described in complaint) and make settlement thereon as his homestead, and on the next day, April 23, 1889, made H. E. No. 4, Guthrie series, for the same, paying the legal fees and commissions, $14.00, and receiving the proper duplicate receipt, a copy of which is made an exhibit. (Record, p. 9.) That plaintiff complied with the requirements of the homestead law in the matter of improving said land and residing thereon; that he had not previously entered upon and occupied any part of the lands opened to settlement on April 22, 1889, except as stated already; that prior to April 22, 1889, inquiry had been made of the Commissioner of the General Land Office, on behalf of persons situated as was plaintiff in said Territory, as to whether their remaining in said Territory would, in any way, interfere with their taking homesteads therein, and the said Commissioner, in reply, prepared a letter addressed to Hon. John J. Ingalls, then a United States Senator, in which it was stated that persons discharging the duties of official

positions in said Territory would not be disqualified from taking homesteads; that this letter was approved by the Secretary of the Interior before being sent to its address, and it and other similar opinions were embodied in a circular of instructions and information, which circular was widely circulated and published prior to April 22, 1889, for the information of the public and of such officers as plaintiff. It is further alleged that the Secretary of the Interior, himself, gave personal assurance with regard to a deputy marshal, that he would not be regarded as disqualified. Relying on these opinions and assurances, plaintiff remained in said Territory and made homestead settlement and entry, as aforesaid, in entire good faith.

That after his said settlement was made and his rights had attached to the land, various other persons went upon said quarter, although notified of plaintiff's claim, among them being the defendant Fitzgerald, who asserted a homestead right to said quarter, and numerous other parties who, over plaintiff's protest, staked out a large part of said land as a town site; that on May 9, 1889, and at other times, contests were initiated against plaintiff's said entry, resulting in a hearing before the local land officers, and, upon successive appeals, in a decision by the Secretary of the Interior canceling his said entry, the Secretary in his said decision having made the following finding of facts in reference to plaintiff's acts in the premises:

"Ransom Payne made homestead entry for the N.W. ¼ of section nine (9) on April 23rd, 1889. Said Ransom Payne was a United States deputy marshal, duly appointed prior to the passage of the act of March 2nd, 1889 (16 C. L. O., 10, 11), providing for the opening of the Territory of Oklahoma to settlement, and prior to

the proclamation of the President fixing the day of said opening, and he entered said Territory prior to April 22nd, and was there at noon of that day, in obedience to orders issued by his superior officer, and he was there in the discharge of his official duties. Immediately after 12 o'clock, noon, of April 22nd he went upon the land in question and commenced to dig a hole in the ground for a well, and as soon as practicable appeared at the local office and made his entry. So far as his age, citizenship, etc., are concerned he was a qualified homestead claimant, and he bases his claim upon his prior settlement."

Plaintiff further alleges that the Secretary of the Interior, in canceling his entry, misconstrued the provision of the act of March 2, 1889, opening said lands, which reads as follows, to wit:

"And provided further, That each entry shall be in a square form as near as practicable, and no person shall be permitted to enter more than one quarter section thereof; but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon or occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

And that the Secretary misconstrued the language used in the President's proclamation, and that he misapplied the law to the facts found by him, and that upon the facts it should have been held that plaintiff was a qualified homesteader.

Plaintiff further shows that after the cancellation of his entry, the defendants, Robertson, Foster, and

Schnell, were appointed a special town site board to enter said land in trust for the inhabitants of the so-called town of East Guthrie, and to make deeds to the same, and that they obtained a final certificate and patent for said land; that at the time and place where they had given notice that they would make town site proof, plaintiff appeared and protested against the same, and himself made and tendered homestead proof under Sec. 21 of the act of May 21, 1890, relating to Oklahoma, and tendered $200, lawful money, in payment therefor, which proof and payment were rejected by the local officers. Copies of said proof and accompanying papers are attached as exhibits. (Record, pp. 10 to 19.)

That plaintiff has done all things required by law to entitle him to a patent for said land, and that but for the Secretary's error in construing the law, patent would have issued to plaintiff instead of to said defendants; that the defendants acquired the title to said land subject to the equitable rights of plaintiff, who is the equitable owner of said land, he having been the first settler on the land, and there having been no town site claimants thereon at the time of his settlement. He alleges the value of the land to be $10,000; that it is no part of the 320 acres upon which the town of Guthrie was built and on which the U. S. land office is located, and was not in any manner reserved. He asks that defendants be restrained from conveying said land to the various intruders who claim the same as a town site and that the legal title be vested in him.

The defendants, the town site trustees, demurred to the complaint on five grounds. (Record, pp. 19 to 21.) Demurrer was sustained and judgment rendered against plaintiff. (Record, p. 21.)

Plaintiff appealed to the supreme court of the Terri-

tory, where the decision of the district court was affirmed. (Record, p. 27.) Hence the appeal to this court.

In the judgment of the Oklahoma supreme court, from which the present appeal is taken, it is shown that the decision of the district court, on the demurrer, was upon the "question of the qualification of appellant as a homestead entryman, under the act of Congress of March 2, 1889," and the supreme court sustains the action of the lower court upon that one ground alone. This was the only question before the territorial supreme court. (Record, p. 27.)

In his six assignments of error, on appeal here, Payne, in various forms, alleges error in sustaining the demurrer to his complaint and in holding that he was not qualified to enter the lands involved as a homestead. (Record, pp. 28, 29.) It will not be deemed necessary to discuss each assignment separately, as what we shall say will apply equally to all.

THE LAW INVOLVED.

By sections 12 and 13 of the Indian appropriation act for the year ending June 30, 1890, approved March 2, 1889 (25 Stats., 1004), provision was made for the opening to settlement and entry of the Seminole Indian lands in the portion of Indian Territory now within Oklahoma Territory. Sec. 13 provides particularly for the disposal of the lands "under the homestead laws only, except as herein otherwise provided." Among the provisions of said section is the folowing clause:

* * * "But until said lands are opened for settlement by proclamation of the President, no per-

son shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any rights thereto."

It was held by the Secretary of the Interior that Payne was within the inhibition of the above clause and therefore disqualified. This decision was rendered in the case of The Town Site of Guthrie vs. Paine et al., June 22, 1891, and is reported in full in the official reports of the Secretary's decisions, 12 L. D., 653. After finding the facts as to Payne, as above quoted from the complaint in the case, the Secretary states his conclusions of law as follows:

"In no act relating to the public domain is the intention of Congress more clearly indicated than in the one under consideration, and that intention was to place all citizens and claimants on an absolute equality, so far as fixing the time when a claim to land could be aserted, and when the initiatory steps toward asserting such claim could be taken. To hold that deputy marshals, trainmen, and others who happened to be within the limits of the Territory in the discharge of their duties and in receipt of the salary and emoluments of their position at the moment the lands were open to settlement could take advantage of that fact and in advance of others immediately enter upon desirable tracts to the exclusion of those who had in obedience to law remained outside of the Territory would be a violation of the clearly expressed intention and spirit of the act. In my opinion such an interpretation is too unjust to be entertained. The facts in relation to the opening of this country were known to all. Parties who occupied positions similar

to that occupied by Payne had abundant opportunity to qualify themselves as claimants by withdrawing from the Territory and placing themselves on a par with others had they so desired. This Payne declined to do, but sought to take advantage of his position to anticipate the arrival of any other claimants from the point they had occupied in obedience to law. This he cannot be permitted to do under the law. Had Payne declined to make any act of settlement until after sufficient time had elapsed for those waiting on the border to reach the point in controversy, and thus placed himself on a par with other claimants, a far different state of facts would have existed, and a different rule might have been applied in the consideration of this claim, but under the present state of facts, there is neither equity nor law on his side, and your decision canceling his entry is affirmed."

It is this view of the law that we controvert.

The case at bar is the second "sooner" case from Oklahoma, the first being the case of Smith vs. Townsend, 148 U. S., 490, which should be distinguished from the present case.

The single legal question presented by the appeal is, Was a citizen who was required by his official duties to be within the limits of Oklahoma on the day of opening disqualified from making homestead entry under the clause quoted from the act of 1889, by reason of being at his post of duty, he being otherwise, in all respects, duly qualified?

ARGUMENT.

I.

In the first place, the homestead privilege is a valuable beneficial grant to each American citizen. It was

given by the Government as an inducement to its citizens to go upon the unsettled public domain and develop the same, reduce the wild lands to a state of productiveness and thus increase the general store of agricultural products necessary to supply the nation with food. The homestead law is a beneficial statute and is to be liberally construed. It is so held by this court. In Clements vs. Warner, 24 How., 394 (at p. 397), it was said:

"The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

And in Ard vs. Brandon, 156 U. S., 537, the court, speaking by Mr. Justice Brewer, after having said, "The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon," proceeded as follows (op. at p. 544):

"Doubtless the error could have been corrected by an appeal, and perhaps that would have been the better way; but when, instead of pursuing that remedy, he is persuaded by the local land officer that he can accomplish that which he desires in another way—a way that to him seems simpler and easier—it would be putting too much of rigor and technicality into a remedial and beneficial statute like the homestead law to hold that the equitable rights which he had acquired by his application were absolutely lost."

The demurrer, in the case at bar, admits the facts pleaded by Payne. It admits his qualification, in all respects, under the homestead law and that the Secretary of the Interior had found him to be qualified, after a hearing had, except as to this one feature of "sooner-ism." He, therefore, is entitled to the tender dealing

spoken of in Ard vs. Brandon, *supra*, and the law is to be liberally construed in his favor, unless he forfeited his right to its protection.

The issue here is purely one of statutory construction. There is no suggestion of fraud on Payne's part nor of any attempt by him to do an overt act which, of itself, would deprive him of the homestead privilege in Oklahoma. If he is disqualified it is because of the necessary construction of the statute and not because of any unlawful act done by him. We submit that before it can be held that he forfeited his homestead privilege on April 22, 1889, it must clearly and affirmatively appear that the statute, itself, declares such forfeiture. Forfeitures are odious in the eyes of the law and are never presumed nor sought for.

II.

What is the exact meaning of the inhibition in Sec. 13 of the act of 1889? What is it that operates as a disqualifying circumstance? The precise act is expressly mentioned by Congress and the language cannot, therefore, be extended by implication to embrace a broader class of acts. The first clause of the inhibiting section declares that no one "shall be permitted to enter upon and occupy" the lands to be opened until the time fixed by the President. Then follows the exact action which is declared to be a perpetual bar to homestead entry as against those affected by it, viz: "and no person *violating* this provision shall ever be permitted to enter any of said lands or acquire any right thereto." The exact thing, then, that disqualifies, is some act which amounts to a *violation* of the law against entering and occupying. It has been assumed that the mere fact of presence within the Territory at the hour of

opening is, in itself, a violation of the law, without regard to the character or occasion of the presence; but this involves a palpable inconsistency. It is conceded that Payne was not only lawfully within the Territory, by permission, but that his *duty required* him to be there. To have been elsewhere would have been a violation of law. Payne was a sworn officer of the United States and by law required to obey the orders of his principal. It is said that he was at Guthrie *lawfully* on April 22, 1889, and, in the same breath, that he violated the law by being there. How is this possible? An act cannot be both lawful and unlawful at the same time.

Payne violated no law up to noon of the day of the opening of these lands. This seems to be conceded by the Secretary of the Interior. Indeed, he expressly says that if Payne had gone out of the Territory and come in at noon, or if he had waited until those at the line had had a chance to reach the same land, he would not have been disqualified, and, as we shall see presently, the Interior Department still holds the same way, even since Smith vs. Townsend was decided. If the inhibition quoted as disqualifying Payne was not violated prior to or at the hour of opening, nothing he could afterward do would violate it. As this court aptly said in Smith vs. Townsend, the wall around the Territory, erected by the act of 1889, fell down at noon of April 22, 1889, and there was no barrier to any one going where he pleased. If Payne was disqualified, therefore, the thing that disqualified him must have happened prior to that hour and the law is explicit in saying that a man that is disqualified under this act is forever disqualified. "Once a sooner, always a sooner," may well become a legal maxim in the law of Oklahoma.

Of course, the only action that can be held to disqualify Payne is the lawful action of discharging his duty, by obeying the U. S. Marshal and staying at Guthrie to protect the land officials and keep the peace in the great rush that was expected. Was this inhibition against entering and occupying the lands to be opened directed against public officials otherwise qualified, whose duties to the public could only be discharged by going within the territorial limits prior to the hour of opening? Is it to be assumed that Congress intended to declare that all public officers whose presence in the Territory at the hour of opening was absolutely necessary to the public good and to the success of the opening should by their very faithfulness to duty forfeit valuable rights as citizens? We do not believe it. In order to construe the statute we must consider the conditions and circumstances surrounding the opening of these lands. This is held in Smith vs.Townsend, *supra*, and we refer to the opinion in that case for a finding by this court of the conditions and circumstances surrounding these lands prior to the passage of the act of 1889. It appears from that finding that the mischief to be remedied by this legislation was the disposition on the part of a certain lawless element to intrude upon these lands, notwithstanding the fact that they were Indian lands and every white man who went upon them without express license violated the law. Not only that, but such intrusion was a violation of four successive proclamations by three successive Presidents of the United States. It was this defiance of law and Executive proclamation which was to be remedied, and it was the man who, in *violation* of law and proclamation, insisted upon entering upon and occupying these lands against whom the inhibition and the penalty were directed. They were not di-

rected against the law-abiding citizen who, because of his special fitness to serve the public, had been selected by the agents of the law to go ahead of settlers in order to protect public officials and keep the peace during the opening. They certainly were not directed against one whom the law invited and *compelled*, if he obeyed it, to be within the limits of the lands to be opened at the hour of opening. Again we say this statute was directed against violators of the law, not against the agents and upholders of the law.

If Payne comes within the general language of the statute, at all, his case should be held to be an exception to the general rule. It is well settled in the construction of statutes that a literal construction will not be enforced if it would carry the rule beyond the reason of the law, and especially where to do so will do an injustice. It is presumed that the legislature intended to make exceptions of such cases. This rule is stated much better than we can state it by Mr. Justice Field, in delivering the opinion of this court in United States vs. Kirby, 7 Wall., where it is said:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The *reason* of the law in such cases should prevail over its letter.

"The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'That whoever drew blood in the streets should be punished with the utmost severity' did not extend to the surgeon who opened the vein of

a person that fell down in the street in a fit. The same common sense accepts the ruling cited by Plowden, that the statute of Edward II., which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'"

The same principle is recognized in Murray vs. Gibson, 15 How., 421, and Reiche vs. Smythe, 13 Wall., 162.

In the case at bar, before the district court, the demurrer to the complaint was argued before Hon. E. B. Green, then chief justice of the territorial supreme court, sitting as district judge. He filed a written opinion showing that but for the decision of the territorial supreme court in Smith vs. Townsend, he would have overruled the demurrer. The closing part of this opinion is as follows:

"In order to construe this act of Congress the question that lies at the very threshold is, 'What is the purpose of the act?' It was evidently to prohibit persons from coming into the Territory who were coming here for the purpose of locating on homesteads, or taking land as homestead settlers, before the time fixed for the opening. Could it have had any reference and did Congress intend that it should apply to an officer of the United States who was in the Territory in the discharge of his duties as such officer? Are these persons within the prohibition of this act? That is the question. If they are not, then they are not disqualified; if they are, then the fact of their being in before the time and between the 2d day of March and the 22d of April would absolutely disqualify them. We can not add to this act, nor can we take from it. We must consider it just as it is. If it applies to the whole world, then it applies to officers as well as private individuals.

If its passage was simply to prohibit persons from coming in who were coming here to select and locate upon homesteads, and who were not here to discharge official duties, then it does not apply and ought not to be made to apply to the officers of the Government who were in the Territory in the discharge of their official duties. Take the case of the general law, of which there are two instances given by Blackstone: One that he cites from Puffendorf; there was a law that provided that whoever drew blood upon the street should be subjected to a certain p alty. That was a law in its terms general, and excep no person, and yet it was conceded by all that it d not apply to a surgeon who had bled a man who had fallen down in a fit upon the street.

"There is another one. Take the case that is cited by Blackstone from Cicero or Herennius. There was a Bolognian law that whoever remained upon a ship, when subjected to perils from a storm, should be entitled to the ship and whatever property was upon the ship at the time. A ship was about to be wrecked and the whole crew and all persons left it except a sick man who was unable to leave. He remained upon the ship and it came safe to shore and he claimed it under the provisions of the act and it was universally conceded that he was not within—while he was within the letter of the act, he was not within the spirit of the act. That the purpose of the law was to encourage persons to remain on board and endeavor to save the ship—a person who could do something to save the ship and the property. Now these were former applications of the construction of statutes and of general laws. When we look at the intention of Congress in this act, the purpose of the act was to restrain persons from coming into this Territory who were coming here for the purpose of locating upon and occupying homesteads, from

coming here between the 2d day of March, 1889, and noon of the 22d of April, 1889, and it applies only to those persons and to no others. That was the purpose of the act, and while an officer may be within the letter of the law, yet, in order to disqualify him from taking a homestead, he must not only be within the letter of the act, but he must be within the spirit of the act. It is a very fair rule of construction of statutes that that which is within the letter of the act is not within the conditions of the act unless it is within the spirit of the act. Now, in order to disqualify this homestead entryman, the Secretary is compelled to hold that he was not disqualified by reason of his being here in the discharge of his official duties up to the 22d day of April, but that he disqualified himself by not going out and coming in. There is no act of Congress that required him to come out and come in. If he was not disqualified by being in, the act of Congress did not require the he should go out and come in. Then the other ground is, conceding that he is not disqualified, that he should have waited a reasonable time after 12 o'clock, noon, before settling upon this homestead. There is no provision of the law that requires that. I am very clear that this man is a qualified homestead entryman; but under the decision in the case of Smith vs. Townsend of the Supreme Court, which this court is required to follow, and this case is covered, in my judgment, by the ruling and the law as held there, and by virtue of that case, although I am satisfied that this man is a qualified entryman, I shall be compelled to sustain the demurrer and let this case go to the Supreme Court, where the court can pass upon it, and modify the case of Smith vs. Townsend, so as to give to this man the rights that he is clearly entitled to under the law, and but for that case I should overrule the demurrer and

let it go up and be passed upon by the Supreme Court. It can go upon a short record and be heard within a very short time."

Judge Green's reasoning is certainly sounder than that of the Secretary of the Interior, as quoted in the beginning of this argument. We call attention to the fact that the same judge who delivered the foregoing opinion also delivered the opinion of the Oklahoma supreme court in Smith vs. Townsend.

III.

What is the test of disqualification? The Interior Department has settled down into holding that it is simply a question of *advantage*. If a party was inside the closed territory, within the inhibited period, whether lawfully or unlawfully, but was outside at the hour of opening, it is held that if he gained no advantage or sought none by reason of such presence, he was not disqualified.

Sullivan vs. McPeek 17 L. D., 402.
Dean vs. Simmons, 17 L. D., 526.
Curnutt vs. Jones, 21 L. D., 40.
McMurray vs. Darbro, 21 L. D., 147.

In later cases, which are now the controlling precedents, the Secretary has held that presence in the Territory, even at the hour of opening, does not disqualify, under certain circumstances, distinguishing the case of Smith vs. Townsend, *supra*. We call attention to two of these decisions. The case of Jacob Kaufman, 21 L. D., 370, involved the question whether or not the homestead entry of a tract of land in Oklahoma by one Dunham was lawful. Dunham was within the lands opened on April 22, 1889, at noon, but was then a minor.

When he became of age he made an entry. His presence in the Territory at the hour of opening was not required by any official or public duty, and he was certainly within the letter of the law. Yet Secretary Smith, on precisely the same line of reasoning we have already pursued, held he was a qualified entryman. In other words, he held that an exception must be made to the general language of the statute. He said:

"It is not to be assumed that the law was directed against persons who, for other reasons, were disqualified from making entry—the obvious purpose of the act being to prohibit persons, otherwise qualified to enter land, from going into the Territory during the prohibited period. Dunham's presence on the right of way of the railroad on that day was not unlawful; he did nothing then or afterward to prejudice any other person's right; and in my opinion, his entry, made long subsequently, when he attained his majority, should be allowed to stand intact."

The case of Hershey vs. Bickford et al., 23 L. D., 522, decided by Secretary Francis, Dec. 23, 1896, goes still further. Bickford had been for a long time a resident of Leavenworth, Kan. He was an employee of the Indian Bureau as an inspector of flour, and was also a Government contractor. His duties required his presence in Oklahoma in April, 1889, and at the hour of opening these lands he was on the "Government acre" at the Kingfisher land office, just as Payne, in the case at bar, was on the "Government acre" at Guthrie. The Secretary quotes Smith vs. Townsend, but distinguishes Bickford's claim because of the fact that Bickford did not make entry until about two years after the opening, he having contested a prior entry in October,

1889, for the purpose of securing a preference right under Sec. 2, of the act of May 14, 1880 (21 Stats., 140). We ask that the Secretary's reasoning on pages 527 and 528 of his opinion be noted. It is too long to quote entire here. On p. 527 he says:

"Due consideration of the mischief which the law was designed to correct and of the reason of the remedy provided will not justify such an interpretation of it as would exclude Bickford from making a settlement nearly two years after the Territory was formally opened. His presence on the "Government acre" at the time of the opening secured to him no advantage whatsoever with respect to the settlement ultimately made by him. The equality of opportunity which it was the manifest purpose of the statute to secure to all settlers alike, is not in any degree impaired, imperiled, or involved by an entry made nearly two years after the formal opening. Assuming, therefore, that Bickford's case is within the letter of the statute, it falls without the spirit of it. The distinction between the letter and the spirit of the act was recognized by the Supreme Court in Smith vs. Townsend, and it is intimated that the spirit, rather than the letter, of the law should be adhered to."

It will be seen that he tries to reconcile his position with the ruling of this court in Smith vs. Townsend, but the reasoning is specious in the extreme. If Bickford was disqualified from making settlement at noon on April 22, 1889, he could not subsequently become qualified. The language found in the two acts of March 1 and 2, 1889, respectively, is quoted in the opinion. In the former act the inhibition is directed against "any person who may enter upon any part of said lands

prior to the time that the same are opened to settlement." In the latter act, applicable to the Seminole lands particularly, the language is, "*Until* said lands are opened * * * no person shall be permitted to enter," &c. In each the disqualifying act is something done *prior* to the hour of opening. If not disqualified prior to that hour, nothing that a man could do afterward would disqualify him. On the other hand, if something he had done prior to that hour rendered him disqualified *then*, nothing that he might afterward do or *refrain from doing* could restore the lost right. Congress expressly declares that "no person violating this provision shall *ever* be permitted to enter any of said lands." It was not said that persons inside the Territory at the hour of opening, if they waited until the next day, should not be disqualified. The attempt to distinguish Bickford's case from Smith vs. Townsend on the ground on which the Secretary bases it is a lamentable failure. This court said, in that case:

"The evident intent of Congress was, by this legislation, to put a wall around this entire Territory and disqualify from the right to acquire, under the homestead laws, any tract within its limits every one who was not outside of that wall on *April* 22."

Bickford was within "that wall" on April 22, and yet the Secretary says he is not included in the inhibition. We agree with his conclusion, but not with his logic.

The error in all this reasoning, in our judgment, is in saying, without qualification, that it is simply a question of *advantage*, and in holding that the man that had some advantage over others at the opening hour was disqualified. As is shown in the Bickford case, the Department does not follow its own rule. Bickford was inside the Territory at the hour of opening, pre-

cisely as Payne was, and possessed whatever advantage that fact might have given just as much as our client did. There is not a syllable in the language used by Congress that justifies the ruling to the effect that the inhibition is only against the man that seeks to use some advantage which his position at the hour of the opening may give him.

The advantage which the law sought to prevent was an *unlawful* advantage, one gained by the *violation* of the law previously in force against intrusion upon Indian lands and the special provisions against entering upon and occupying any of these lands prior to the opening. If there was no such unlawful entrance the law took no notice of any *advantage* otherwise obtained. It is said that the object of the law was to put all prospective settlers on a footing of equality. If such was its object, the means taken to accomplish it were totally inadequate. There was no equality of competitors on the day of opening. At the line, all around the territory to be opened, were men and women of all kinds, ages, races, colors, and conditions of life. There was the well-trained, lithe-limbed young man on a fleet race horse by the side of a one-legged veteran of the late war on foot. There was the cow boy on his cow pony, master of the prairie, by the side of the old farmer, with all he had in the world, including his wife and children, loaded in his old farm wagon, drawn by an ox team. Where was the equality? Where was the disqualification by reason of being possessed of an advantage? In that keen race for a quarter section of Uncle Sam's great domain it was not the humble, hard-working son of toil, who earnestly sought a real home for his family, that got the best land. It was the young man without encumbrance and with a fast horse that came out ahead. And why not? If he used no unfair

means, took no unlawful advantage, went nowhere that the law forbade, did only what the law commanded, why should he not be given the benefit of his superior opportunity? He *was* given the benefit of it.

Ransom Payne, it is said, had an advantage and used it, but it was not an *undue* advantage. It was not obtained by fraud, deceit, overreaching, treachery, breach of trust, or anything of the kind. If there was advantage in his position it was not of his seeking or obtaining. It was a mere unsought incident, a chance of fortune, due to his obedience to orders and the faithful discharge of duty. The Secretary says of him that he "declined" to go outside. This is scarcely fair. He was given no opportunity to go outside. He was commanded to stay *inside*. The law was not violated by his being where he was. It would have been violated, had he been elsewhere. The public welfare demanded that certain public officers should be present at the local land office to preserve the peace. Those whose duty it was to execute the law thought so at least, and, acting upon their judgment, stationed Payne at Guthrie for that purpose. Certainly, it will not be held that a man by faithful obedience to law and duty forfeits any of the rights given him by law in the absence of an express declaration to that effect. The policy of our Government is just the other way. It encourages faithfulness in the discharge of public duties. It does not cause a forfeiture of rights as a citizen to follow from a discharge of duty. For instance, in 1864, in order to prevent citizens who were in the army, thousands of miles from their homes and voting precincts, from losing their right of suffrage by reason of being at the place of duty, a plan was devised by which the soldiers in the field might cast their ballots in the

Presidential election and have their votes counted in their respective States.

It certainly was not the intention of Congress to put any obstacle in the way of securing the services of the best men as public officers in Oklahoma. The man who went into that Territory in advance of the opening of the lands for the purpose of being on hand to keep the peace, quell disorder, and overawe the reckless and lawless gangs of gamblers, sharpers, and ruffians generally that flocked to the place, had no easy time of it. He took his life in his hands, and the current history of Oklahoma records the death of many a brave man killed in the discharge of his duty as a *genuine* deputy marshal. The Government was eager to secure the service of such men as Payne before this opening, and the records of the Interior Department show that this very question was raised as to whether a citizen, otherwise qualified, would forfeit his right to enter a claim in Oklahoma if he accepted an appointment the duties of which would require his presence inside the country at the hour of opening. It is alleged in the petition, and admitted by demurrer, that an official opinion was given by the Commissioner of the General Land Office, approved by the Secretary, to the effect that such an officer would not forfeit his right of homestead. It is farther alleged that the case of a deputy marshal was submitted to the Secretary in person, who gave the strongest possible assurance that the party might safely accept appointment and that he would be protected in his rights. These opinions and assurances were published broadcast, and Payne alleges that he knew of them and relied upon them. If there is such a thing as estoppel against the United States we have here all the elements of a genuine estoppel. At any rate, we have a strong circumstance to prove the entire

good faith of this appellant and to show that there was no intent in his mind to violate the law.

The advantage that Payne is supposed to have had is chiefly imaginary. He was far in the interior of the country it is true, but there is no reason to suppose that the lands there were any better than those on the border. As a matter of fact, the records of the official survey of the township in which the land here involved lies, show that the quarter claimed by Payne was upland. It is on quite a hill and is far from being a desirable agricultural claim. He was limited to a narrow range in making his choice, because his official duties kept him close to the local office. He could not mount his horse and ride to a choice claim in some rich river bottom. Those gathered on the outside were free to go to points where the watercourses cross the lines whence they could, at the hour of opening, step across the lines or ride a greater or less distance, upon a rich and fertile claim, well watered and timbered. Payne could not do this. The advantage was more apparent than real.

IV.

But is not this case governed by Smith vs. Townsend, *supra*? If so, and if that case is to be adhered to in all the breadth of the general statements contained therein, then the decision appealed from must be affirmed. We believe, however, that the case at bar should be distinguished from that.

In Smith's case the facts were entirely different from Payne's case. Smith was an employee of the A. T. and S. F. Ry. Co., being a section hand, employed within the territory to be opened on April 22, 1889. He was living with his family in a tent, on the right of way of

said company where it passes through the identical tract he subsequently claimed as a settler. He was there at noon on April 22, and immediately afterward he moved his tent about 150 feet, to another point on the same quarter section just off the right of way. Prior to the date of the opening Smith had told his fellow workmen that he intended to settle upon and claim *that identical quarter* on which he was stopping. The railroad company, so far from requiring him to remain inside the territory, had issued a notice to its employees, warning all of them that expected to enter lands to go outside before the hour of opening, and Smith's attention had been called to this notice. He disobeyed the requirement of his employers and remained in the country. No duty to the public or even to private interests required his presence inside at the hour of opening. He was within both the letter and the spirit of the act by actually occupying the land he claimed, with intention to claim it, prior to the hour of opening. Here was not only *advantage*, but *undue* advantage. It was this kind of a case that was before this court when that opinion was rendered.

We need not recapitulate the facts in the case at bar. Payne was necessarily within the Territory. He was on the "Government acre" which was not among the lands opened to entry that day. He was not upon the quarter he subsequently entered. He had no opportunity to go outside of the lines. He knew of and relied upon the opinions and assurances expressed by the officers at the head of the Land Department of the Government, in advance of the opening, to the effect that his being within the country in the discharge of official duties would not disqualify him. He had not selected nor been upon the quarter he entered nor any other quarter with a view to claiming it prior to the

hour of opening. The facts are so different as to require the application of different rules of law to them.

The general language used in the opinion in Smith vs. Townsend, of course, includes Payne. It also includes Dunham and Bickford, in the recent decisions of the Department, *supra*, distinguishing those cases from Smith's. Payne's case, we submit, is distinguishable on much more logical grounds than Bickford's, as already indicated in what we have said heretofore.

The decision in Smith's case furnishes a precedent in another case only so far as the facts are substantially the same. Rulings of courts are considered always in reference to the facts before the court and general expressions or broad statements which go beyond the particular case before the court are not to be regarded as controlling the judgment in a later case involving the very point. The reason for this rule is very sound and is best stated by Chief Justice Marshall in the leading case of Cohens vs. Virginia, 6 Wheat., 264, where he says (op. at p. 399):

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In United States vs. Bank of United States, 5 How., 382, it was held that only the question raised and de-

cided by the court from which the case is brought to this court can be decided here.

In Gaines vs. Hennen, 24 How., 553, it was said:

"The rulings of courts must be considered always in reference to the subject matter of litigation and the attitude of parties in relation to the point under discussion."

In Carroll vs. Carroll, 16 How., 275, the question is carefully discussed as to how far the ruling of a court is to be recognized as a precedent, and it is there said:

"And therefore this court and other courts organized under the common law has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties."

These rulings should be applied to the opinion in Smith vs. Townsend. It was unnecessary to the conclusion reached in that case to declare in sweeping terms that mere bodily presence in the territory opened to settlement on April 22, 1889, without regard to the purpose or character of such presence, operated, *per se*, to disqualify the party. Smith's presence was, under the facts found by the court on an agreed statement and set out in the beginning of the opinion, clearly a violation of the law. He not only was not required to be present by any command of his employers or duty to them or to the public, but he had been expressly notified by the railroad company to go outside if he wanted to claim a homestead. Not only so, but Smith was upon the identical quarter he attempted to claim in advance of the hour of opening, with the fully formed intention of claiming that land. He was clearly within the letter and spirit of the acts of both March

1, 1889, and March 2, 1889, and there was no ground on which to base a claim that he was excepted from the language of the act. He was one of the very parties against whom the inhibition of the act was directed.

Payne's case, as we have seen, is fundamentally different. We will not repeat the facts in the case at bar, for the court will bear them in mind. We ask that our proposition to the effect that Payne's case should be declared an exception to the statute be carefully considered. As we have seen, the Secretary of the Interior has, in two decisions rendered since the ruling in Smith vs. Townsend, recognized two classes of persons in the Territory at the hour of opening as exceptions to the general language of the act of Congress, to-wit: 1. Those who were not at the time qualified in some other respect, but who became qualified afterward. 2. Those who did not attempt to settle or enter lands on the day of opening. It is quite clear that the Secretary believed that the broad and general language used by this court in Smith's case was not binding upon him. Otherwise, it would be impossible for him to avoid its effect. The closing declaration in that opinion is, "one who was within the territorial limits at the hour of noon of April 22 was, within both the letter and the spirit of the statute, disqualified to take a homestead therein."

We again call attention to the fact that when the chief justice of the Oklahoma supreme court who prepared the opinion of that court in Smith vs. Townsend came to fully and carefully consider Payne's case when it came before him in the district court, he held that the latter should be distinguished from the former, but was required to follow the ruling of the supreme court in his conclusion, with a view to modifying the sweeping, general language in Smith's case,

when the Payne case should reach the territorial supreme court. Before Payne's case could be decided there, however, this court had, on April 3, 1893, affirmed the decision in Smith vs. Townsend without modification. The result was the supreme court of the Territory affirmed the decision of the district court against Payne, remarking that his case was "*somewhat* like" that of Smith vs. Townsend. It is quite apparent that the judges below had modified their views of the law very materially, and that our case would have been distinguished from Smith's but for the general language used by this court in affirming the decision in the Smith case.

On this whole case, then, we ask that the decision appealed from be reversed, with instructions to direct the district court to overrule the demurrer.

Respectfully submitted,

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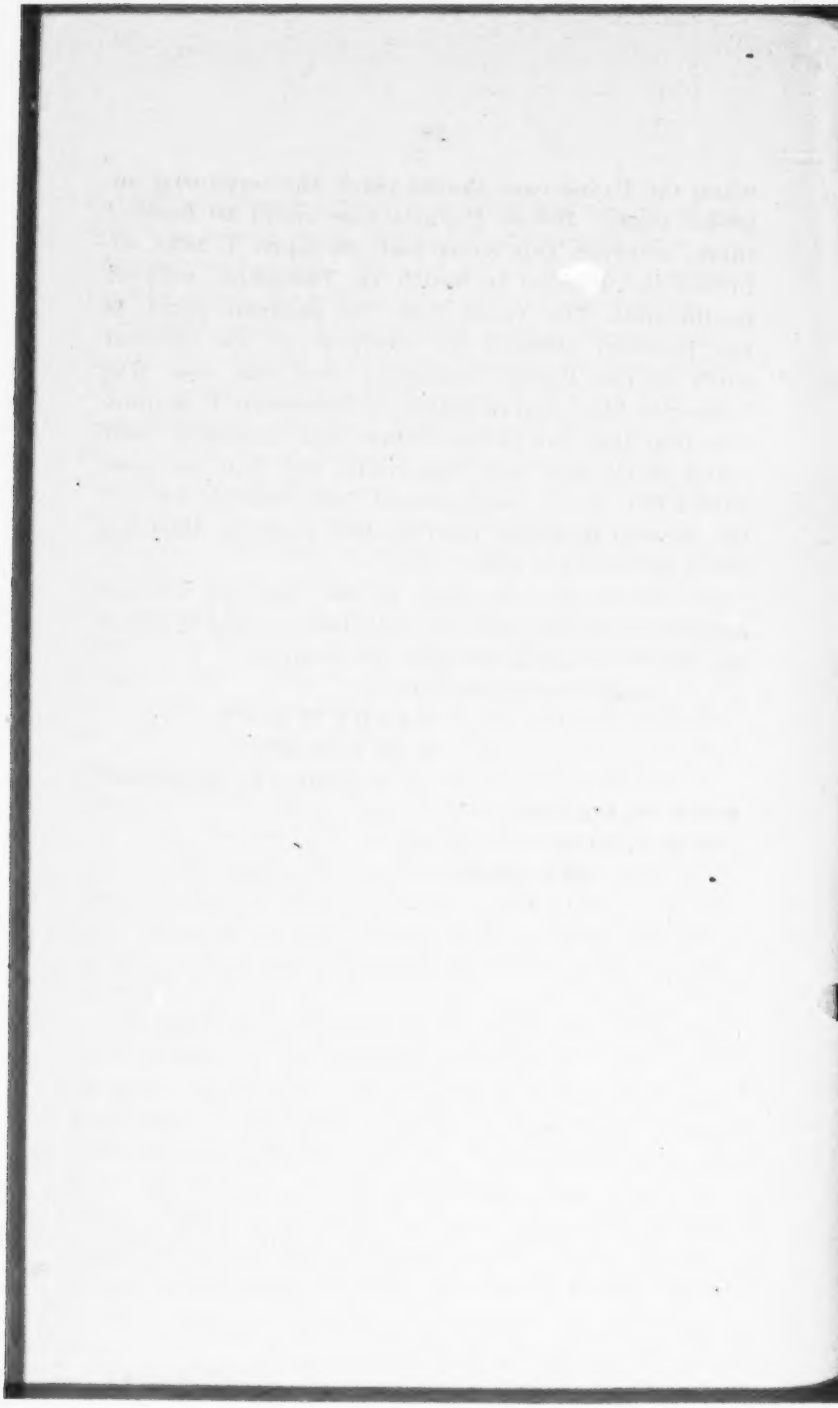

No. 20.

Reply Brf. of Luckett for Ap

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

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RANSOM PAYNE,
Appellant,
vs.
W. S. ROBERTSON *et al.*,
Appellees.
No. 20.

APPELLANT'S BRIEF IN REPLY TO BRIEFS OF APPELLEES.

HENRY N. COPP,
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BYRON S. ADAMS, PRINTER.

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APPELLANT'S REPLY TO BRIEFS FOR APPELLEES.

Three briefs have been filed by appellees, in at least two of which certain points are sought to be raised which were not presented by them in the Oklahoma Supreme Court and which are not discussed, therefore, in appellant's original brief. It is necessary for us to examine these points with some care. Each of the briefs is signed by the Solicitor General, but as two of them are signed by Mr. Horace Speed and one by Mr. Bayard T. Hainer, we shall, in referring to them, designate them as Mr. Hainer's brief, Mr. Speed's reply brief and Mr. Speed's brief, respectively.

I.

Reply to Points Made in Answer to Appellant's Brief.

Before noting the new questions sought to be raised by appellees we notice a few points made in response to our original argument.

In Mr. Hainer's brief (p. 6) and in Mr. Speed's brief (pp. 5, 6, 7 and 13) it is contended, more or less explicitly, that appellant is seeking to control the action of the townsite trustees in the administration of their trust and in the discharge of their duties as trustees, under the discretionary and semi-judicial powers given them by the Oklahoma townsite act of May 14, 1890 (26 Stat., 109). This shows an entire misapprehension of appellant's ground of action. He is not seeking to have the trustees directed or controlled in the discharge of their trust, but on the contrary, is attacking the trust directly, and is asking a decree to the effect that the Secretary of the Interior erred in construing the law as to *appellant's* prior claim to this same land under the homestead law and that because of appellant's superior rights the title to this land should be declared to be in him and not in the appellees as trustees for the townsite occupants. We are seeking, in other words, to have a court of equity declare that the Secretary of the Interior erred in conveying this land in trust to these appellees and their successors because the land had been previously appropriated under the homestead law by appellant and was not subject to townsite entry. If appellant had no legal entry, then he has no interest in the land and does not seek to control the action of the trustees in discharging their trust. This is not, as stated in Mr. Speed's brief (top of page 7), "the same sort of attempt" that was made in the case of McDaid *vs.* Oklahoma, *ex rel.* Smith (150 U. S., 209). What we have just said indicates the distinction between that case and the case at bar. In that case an effort *was* made to control the trustees in the exercise of their powers and the discharge of their duties *as trustees* and compel them, by writ of mandamus, to convey a town lot to one of two conflicting claimants. Both parties were claiming under the trust. This is no such case. Payne is resisting the trust.

The attempt to apply the case of Litchfield *vs.* Register and Receiver (9 Wall., 575) and similar cases, to this one shows, also, a failure to understand the theory of appellant's case. In that case a proceeding was brought to enjoin the register and receiver of a local land office from entertaining and allowing a certain pre-emption application. As was said by the Court, the local officers had no interest in the land and *did not represent* the claimants. In Oklahoma townsites, made under the act of May 14, 1890, *supra*, the trustees do represent the occupants of lots. They hold the title in trust for such occupants and are required to convey the lots to the occupants after having identified them. Their relation to the title and to the occupants of the townsite is precisely the same as that of a county judge or the municipal authorities of an incorporated town, in a townsite made under Secs. 2387, 2388, and 2389, U. S. R S. The procedure, however, in the two classes of cases is different. In a townsite under the general statute the trustee administers his trust under rules and regulations prescribed by his State or Territorial legislature. In an Oklahoma townsite the trust is precisely the same, but it is administered under rules and regulations prescribed by the Secretary of the Interior, subject to the right of successive appeals to the Commissioner of the General Land Office and the Secretary himself.

That these trustees represent the townsite settlers is expressly held by the Secretary of the Interior. In Brummett *vs.* McCordia Townsite (24 L. D., 468), Secretary Bliss held, (quoting syllabus):

"On the application of townsite trustees to make a townsite entry a charge of abandonment, as against the townsite settlers, may be properly entertained, and notice to said trustees of the hearing ordered is notice to lot claimants."

The case of Gonzales *vs.* French (164 U. S., 338) was as much like the case at bar as the McDaid case, *supra*, was not

like it. There Mrs. Gonzales sued the probate judge, acting as trustee for the townsite of Flagstaff, Ariz., under the general townsite law, to have her alleged superior claim to the land, under the pre-emption law, recognized and enforced. The case was determined on its merits as between herself, on the one hand, and the probate judge, representing the townsite claimants, on the other.

On page 11 of Mr. Speed's reply brief, he asserts that Payne's petition is without merit, that he claims the court "should give him a tract of land where *now* is a living town of thousands of people on the ground that he got *first* to the land, 'began to dig a hole,' and next day filed on the land." The cases he cites, on that and following pages, have no bearing on the case before the Court and we do not stop to discuss them. The sophistry of the suggestion is apparent upon the face of the language used. The gentleman says there is *now* a town on the land but that Payne was there *first*. This is true and it is, also, true that just because he was there first and initiated a homestead claim to the land by settlement, before it was occupied as a townsite, gave notice diligently and faithfully to all comers that he had taken that homestead and made his entry of record promptly, the succeeding day, although under Section 3 of the act of May 14, 1880 (21 Stats., 140), he would have had three months in which to perfect his entry, Payne had a statutory right to the land superior to all later settlers, if he was qualified. In the case of Kingfisher *vs.* Wood and Fossett (11 L. D., 330), Secretary Noble had before him precisely the same kind of case as the one at bar, so far as the question of the relative rights acquired by a homestead settlement, on one hand and a later townsite occupation of the land, on the other hand, are concerned. In that case he held:

In considering the case of Fossett, as he was the first settler upon the land, and his settlement was followed by resi-

dence and improvement, whatever rights he may have acquired were properly held by your office to have attached at the time of his actual settlement, and not on the following day, when he made his claim of record at the local office. His rights cannot, therefore, be impaired by the subsequent occupation, on the same day, of the land embraced in his entry by the townsite settlers.

Inasmuch as neither the courts nor the Department has ever made a ruling to the contrary, the above is a sufficient answer to the contention of counsel.

It is also said that Payne should be left to his remedy at law, and on page 14 of Mr. Speed's reply brief the suggestion is made that he should sue parties occupying the land in ejectment. This was certainly made by inadvertence. Payne has no remedy at law. He cannot sue in ejectment, for he does not hold and cannot obtain the legal title. His sole remedy is at equity, to have the courts review the action of the Interior Department in canceling his homestead entry and obtain a decree, if possible, finding error of law on the part of the Secretary and declaring Payne the equitable owner of the land. The very cases cited by Mr. Speed in his other brief (p. 6) conclusively establish this proposition, and we ask to adopt them as our authorities.

II.

What Questions Are Before the Court.

In the briefs for appellees counsel attempt to raise the following questions:

1. That Payne's action was brought on the territorial side of the district court and not in the court sitting as a United States District Court, and, therefore, that the court had no jurisdiction of the defendants. (Mr. Speed's brief, p. 7.)

2. That there is a defect of parties. (Mr. Hainer's brief, p. 7; Mr. Speed's brief, pp. 8, 9.)

3. That the suit was premature, the legal title being still in the United States. (Mr. Hainer's brief, p. 4.)

4. That the suit has abated because the defendants are no longer in office. (Mr. Hainer's brief, p. 8.)

5. That Payne was disqualified as a homestead claimant because of the alleged speculative character of his entry. (Mr. Speed's reply brief, p. 8; Mr. Hainer's brief, p. 9.)

None of the above propositions were raised in the Supreme Court of the Territory. They were not passed upon by that court. They are not raised by our appeal. Hence, they are not before this Court for decision.

The demurrer filed by appellees, defendants below, in the district court (p. 19, *et seq.* of Record), specifies five grounds of objection to the "complaint," but in the "note" thereto, signed, "Horace Speed, U. S. Att'y," the only point pressed upon the attention of the court was Payne's supposed disqualification, because of "soonerism," arising under the fourth ground of demurrer, viz; that the complaint "does not state cause sufficient to constitute a cause of action."

In our original brief, beginning at page 14, we quoted at length from the written opinion of the trial judge, filed in the case, from which it appears that this one ground of disqualification was the only question considered by him.

In the specifications of error in the appeal to the Oklahoma Supreme Court (Record, pp. 24, 25), the specific errors alleged all relate to the one question.

The appellees, Robertson *et al.*, filed a simple "Joinder in error," signed by Mr. Speed, in the Territorial Supreme Court, in which they allege "that there is no error in the proceedings in the court below." (Record, p. 26.) The case was submitted in the Supreme Court, "on the transcript of the record and errors therein assigned, without argument and *without the filing of briefs.*" (Record, p. 26, bottom of page.)

The opinion of the Supreme Court has been certified in the record (p. 27). There, it is said:

"A demurrer was interposed in the court below, raising the question of the qualification of appellant as a homestead entryman, under the act of Congress of March 2, 1889, and was sustained to appellant's bill of complaint," etc.

This Court will look into the opinion of the court from which a case is brought for the purpose of ascertaining what questions were decided by the lower court.

> Fire Association *vs.* New York (119 U. S., 110), and cases there cited.

As a rule this Court will not pass upon questions that were not presented to the court whose decision it is sought to have reversed.

> McDonald *vs.* Smalley, 1 Pet., 620;
> Bradstreet *vs.* Potter, 16 Pet., 317;
> Bell *vs.* Bruen, 1 How., 169, 187;
> U. S. *vs.* Bank of U. S., 5 How., 382, 395;
> San Pedro, &c., Co. *vs.* U. S., 146 U. S., 120.

This rule is peculiarly applicable to cases coming here through an intermediate appellate court, and was expressly applied, in the case last cited, to an appeal in an equity case from the Supreme Court of a territory. In that case objection had been made by the defendant in the district court to certain depositions which objection was overruled. The decision of the case, in the trial court, was for the defendant. The United States appealed to the Territorial Supreme Court which reversed the decision. The question of the admissibility of this testimony was not raised in the Territorial Supreme Court, but was sought to be raised again in this Court. The right to do this was denied; the Court, in the opinion by Mr. Justice Brewer, saying:

"But our inquiry is limited to the rulings of the Supreme Court of the Territory; it is its judgment which we are re-

viewing. By the appeal the case was transferred as a whole from the district court to the Supreme Court. The rulings of the former court did not bind or become those of the latter, either as to the admission or rejection of testimony, or the decree to be entered. All the testimony taken and filed in the one court was spread before the other, and was apparently proper for its consideration. If the defendant had wished to narrow the examination of that court to any portion of the testimony it should be by appropriate motion to it have challenged the supposed objectionable parts."

So, in the case at bar, where Payne's appeal had removed the whole record to the Supreme Court below, counsel for appellees failed to renew their demurrer or in any manner to invoke a ruling by the court on the questions now raised by them and allowed the Supreme Court to pass upon and affirm the decision of the district court on the one question of qualification. They cannot, now, be heard, by what is practically a motion to dismiss or affirm, to raise questions they did not submit to the Supreme Court below for decision.

This rule will, we are quite sure, be so far applied, at least, that this Court will first determine whether or not there was error committed by the court in its decision on Payne's disqualification, the question being raised directly by our appeal.

We enter our objection, on this ground, to the consideration of the five propositions of the appellees enumerated above, but it is only fair to say that as to the fourth point mentioned by us, viz, the alleged abatement of the suit, the facts on which that is based are alleged to have occurred since the decision of this case in the Supreme Court below.

III.

The Suit Properly Brought.

There is no real merit in any of the counter propositions made by counsel on the other side, aside from the failure to raise the question below.

Mr. Speed, alone, alleges that Payne's suit was brought on the territorial side of the district court, against officers of the United States, and that the court had no jurisdiction over the persons of defendants. The point scarcely deserves notice. It would be a sufficient answer to say that the defendants appeared in the court in which the suit was brought, by "Horace Speed, U. S. Attorney," the same gentleman who now seeks to raise the question, without objection then made. He cannot make it here for the first time.

But the record does not sustain the assertion. On the contrary, the judgment of the court on the demurrer (Record, p. 21) is entitled as follows:

"United States of America,
Territory of Oklahoma, } ss;

September Term, First Judicial District, Logan County, Number 898, *United States District Court.*"

IV.

No Defect of Parties.

It is contended that the trustees could not be sued alone, but that the supposed occupants of lots should have been joined. Indeed, counsel go so far as to say that the trustees are not even proper parties, much less necessary, and they say that we first sued the appellees as private individuals, but will probably now claim that we sue them as officers of the United States. This is another misapprehension of our case.

This suit, as we have already tried to show, was not against the defendants, as officers of the United States, for the purpose of controlling their official action in any respect. We doubt if they would be considered as *officers* of the United States under any proper definition of that term. In the McDaid case (150 U. S., 209, 219), *supra*, this Court aptly described them as "*agents* of the government." But neither do we sue these appellees in their capacity as agents of the government, for the purpose of having the Court control their action in the discharge of their agency.

On the other hand, the suit is not against Robertson *et al.* as private individuals. We have sued them as trustees of an express trust for the purpose of attacking and defeating the trust as a whole and of having plaintiff (appellant) declared the owner of the supposed trust property. In their capacity as agents of the Government, the Secretary of the Interior has caused this land to be conveyed to these parties, in trust for the occupants, the trust to be discharged under the Act of May 14, 1890, under regulations prescribed by the Secretary. They become, therefore, trustees primarily for the occupants and *sub modo* for the Government. (McDaid case, *supra.*) It is as such trustees that they are sued. Our action is against them in their representative capacity, and it was so understood by them and by the Department officials at the time. If not, why was the United States attorney for Oklahoma instructed to defend them in the lower courts, and why does the Attorney-General appear of record for them in this Court?

The point is made that the *cestuis que trust* should have been made parties, but who are they? Part of the duties imposed upon these trustees is to ascertain and identify the legal occupants of lots, hearing contests between conflicting claimants to the same lot, and awarding the same to the rightful claimant. They are to convey the lots to the par-

ties ascertained by them to be the legal occupants, and their action in awarding or refusing to award a lot to a particular individual is conclusive upon him unless reversed on appeal to the Commissioner or Secretary. This action was begun promptly upon the issuance of the patent to these trustees and before any deeds had been made by them, as is shown by the allegation in the complaint (Record, p. 8) that the trustees "are about to commence making deeds." This is conceded by counsel on the other side (Mr. Speed's brief, p. 15; Mr. Hainer's brief, p. 6). It is also conceded in Mr. Hainer's brief (p. 5), that among the objects for which this land was conveyed to the trustees "was the determination of the rightful claimants of the lots and the issuance of proper conveyance to them."

At the time this action was brought, then, the beneficiaries of the trust had not been identified. The trustees, alone, had the power to identify them. Under such circumstances it is not necessary to join them in an action against the trustees. Indeed, it is impossible to do so.

We concede the general rule to be that in suits in equity in reference to a trust estate, the trustee and *cestui que trust* are both to be joined, but there are important exceptions to this rule and the case at bar comes within the exceptions. The correct rule is laid down in Vetterlein *vs.* Barnes (124 U. S., 400), where the authorities are collected and the case of Sears *vs.* Hardy (120 Mass., 529), cited in Mr. Speed's brief (p. 8), is distinguished. The case at bar is not a suit to enforce the execution of the trust but to defeat it altogether, and is within the express language used by this Court in Vetterlein *vs.* Barnes, *supra*, where it is said:

"But the rule is different where the claim of the plaintiff antedates the creation of the trust and the suit is brought, not in recognition or furtherance of the trust but in hostility to it as fraudulent and void."

The rulings are so fully collected in the above case that it is unnecessary to cite farther authorities, but we refer to the following:

Perry on Trusts, Sec. 873;
Daniel's Chan. Prac., p. 222;
Beach Mod. Eq. Prac., Sec. 70;
Story's Eq. Pl. and Prac., Sec. 216;
Jewett *vs.* Tucker, 139 Mass., 566.

In addition to the above, it must be borne in mind that this case arose in Oklahoma Territory and that the statutes of the Territory, if there are any on the subject, govern in matters of procedure. By Section 3767 (p. 751) of the compiled Laws of Oklahoma (1893) it is provided:

"Except as herein otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustee, subject only to the execution of the trust and the beneficiaries take no estate or interest in the property but may enforce the trust."

For these reasons there was no defect of parties defendant.

V.

The Court had Jurisdiction of the Subject-Matter.

It is earnestly contended that the legal title to the land here involved was still in the United States, when this suit was brought, and that under the rule familiar to all, the courts have no jurisdiction over the title. It is admitted that the land had been patented to the townsite trustees, but it is contended that this patent did not end the jurisdiction of the executive department, and the case of McDaid *vs.* Oklahoma, *Ex rel.* Smith (150 U. S., 209), is confidently cited in support of the contention.

Of course, it is not denied by appellees that when the legal title is conveyed, a court of equity then has jurisdic-

tion to look into the proceedings in the Land Department with a view to ascertaining whether or not a mistake was made in rejecting a claim adverse to that of the patentee and enforcing the rights of the adverse claimant. We submit that, as between a homesteader whose claim was adverse to that of the townsite and the townsite trustees, the action of the Secretary in canceling the homestead entry and patenting the land to the trustees ended the jurisdiction of the Department for purposes of disposal. The land had then been disposed of for townsite uses. By section 6 of the act of May 14, 1890, it is provided that all townsite entries made under the provisions of the act shall be given preference over other business at the local office and shall be made special for adjudication in the General Land Office and the Department; that townsite applications filed prior to the passage of the act shall be prosecuted by the trustees appointed under its provisions, to final issue, and the section then proceeds—

"and when final entry is made, the *title of the United States* to the land covered by such entry *shall be conveyed to such trustees, for the uses and purposes herein provided.*"

The above language seems clear and unambiguous. The title of the United States is the legal title. This title is conveyed to the trustees, charged, of course, with a trust, and "for the uses and purposes" provided for by the act. But, thenceforward, all inquiries by any departmental tribunal into the merits of an adverse claim to the land are concluded. The Secretary could not entertain a homestead application for the land, on allegations of priority of right, nor could he entertain a contest against the town site entry, on charges of illegality, with a view to the cancellation of the patent. He has no more power to recall and cancel this patent than if it had been issued to Payne on his homestead entry.

By what title do occupants of lots hold after deeds have been made to them by the trustees? It certainly cannot be doubted but that they hold the legal title. No patent is issued direct to them by the President. The only evidence of title given them is the deed of the townsite trustees, in which the trustees are the grantors, and if the lot-owners hold the legal title, as counsel on the other side admit they do, it must pass to them by the deed of the trustees. But how can the trustees *convey* the legal title if they do not hold it? Section 2 of the act provides that "in the execution of such trust and for the purposes of *the conveyance of the title by said trustees*," certain certificates issued by provisional town authorities may be accepted as evidence of occupancy. Here Congress expressly recognizes the power of the trustees to convey *the title*, and this certainly means the *same title* that is mentioned in the part of section 6 above quoted, viz, "*the title of the United States*," which had been conveyed to them. It is a familiar rule that a grantor of real estate can convey no better or greater title than he holds and the rule applies to these trustees. If they, then, convey the legal title to lot occupants they must hold the legal title.

Lands belonging to the United States are not subject to taxation by the States or Territories in which they are located, but in Oklahoma undeeded lots in townsites are taxed.

Oklahoma *ex rel.*, Sampson *vs.* Clark *et al.*, 2 Okla., 82.

The McDaid case is not in conflict with the above view of the law. The only question before this Court in that case was whether the decision of the townsite trustees, in a controversy between adverse claimants to the same lot, was final, or whether the Secretary of the Interior had the power, under the act of May 14, 1890, to provide for appeal from such decisions to the Department. It was a question

of the jurisdiction of the Secretary to supervise control and direct the actions of subordinate officials or agents, in his own Department and appointed by himself, in the discharge of their duties under the law. Unless the law had expressly made their decisions final, it would be difficult to find a sound reason for declaring it so. This Court held that *the title* was conveyed to agents of the Government whose actions, in administering the trust created, should be under the supervision of the Secretary of the Interior; but this was not because of the general power residing in the Secretary to supervise and direct the disposal of the public lands. This land is no longer public land. It has been sold by the United States, the Government price has been paid into the Treasury. The meaning of the Court, it seems to us, ought to be clear enough from the language used in the second paragraph, on page 220 of the opinion, which is as follows:

"By the scheme of this Act, the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the Government until the rightful claimants and the undisposed of or surplus lands are ascertained. The Act did not contemplate that the allowance of the entry and the issue of the patent should operate to devolve the final determination of conflicting claims to lots upon these Government appointees, and, until the trustees conveyed, the title did not pass beyond the control of the executive department *in that regard.*"

It is there said that *the title* is held by the townsite trustees in trust for the occupying claimants. In a qualified sense, it is also held for the Government. There can be no other parties in interest. The case, therefore, holds that for the benefit of all parties in interest *the title* is vested in these trustees, and this is precisely the rule as to the title in townsite entries made under the general townsite law. But when

we go a step farther and inquire into the procedure to be followed by the trustees in administering their trust and the supervision to be exercised over them for the purpose of correcting or preventing errors of judgment, we find a radical change made in the act of 1890, for Oklahoma, from the general law, in providing the machinery and the tribunals for these purposes. Instead of administering their trust under Territorial statutes, these boards are governed by regulations prescribed by the Interior Department, and instead of there being an appeal to the courts from the county judge or the municipal authorities, as the case may be, the appeal lies to the officials in the executive department. This is what the language used in the closing lines of the above paragraph means. It is there said that, *with regard to conflicting claims to lots*, "the title did not pass beyond the control of the executive department," until the trustees conveyed it away. But this is very far from saying what counsel contend that the court has said, viz, that the title remains *in the United States* until it is conveyed by the trustees. The meaning is that the title, in its course to occupants of lots, stops in the trustees until the rightful claimants are identified, and that, until deeds are made by the trustees, the title, although in them, is so far under the control of the Department as to enable it to pass upon contests over conflicting claims. But to the vast majority of these town lots there are no conflicting claims. As to these the conveyance of title upon the presentation of a claim is entirely between the claimant and the trustees. (See Secretary's Instructions of June 18, 1890, 10 Land Dec., 666, Sec. 10, at p. 669.) In these cases the Secretary exercises no direct authority and yet the legal title passes to the claimants. In the conveyances made by these trustees, they are the grantors. They do not assume to convey a title held by the United States but a title resting in themselves.

No other form of conveyance would be compatible with the language used in the patent issued to them by the officials of the Land Department. We print as an appendix to this brief a copy of the patent issued to these appellees in this case, and ask that its language be carefully considered. It will be seen that in the granting clause there is no reservation of any interest in the land for or by the United States. The form used is the precise form that is used in granting lands in trust for townsites to county judges and municipal authorities, elsewhere in the United States, and the legal effect is the same.

From all the foregoing considerations, it seems to us that the conclusion is irresistible that the supervisory power which rests in the Secretary of the Interior, over townsite trustees, arises from the subordinate relation of such trustees to himself and not from his general duties in relation to the public lands. The paragraph immediately following the one quoted, *supra*, from the McDaid case begins by speaking of "The regulation of the execution of the trust by the Secretary," and that describes his functions toward the townsite. He is no longer taking steps looking to the disposal of a parcel of the public domain. All those powers and functions were exhausted when he passed on and cancelled Payne's homestead entry, ordered an entry made by townsite trustees and patented the land to them in trust for the occupants of town lots. The legal title was then disposed of as against all possible adverse claimants, and then the right to go into a court of equity and have the legality of the proceedings determined accrued to a defeated claimant of the tract.

U. S. *vs.* Schurz (102 U. S., 378), cited by appellees, upholds a suit in mandamus against the Secretary of the Interior to compel the delivery of a patent and holds that title by patent from the United States is by record, and that when

the officers whose action is rendered by the laws necessary to vest the title in the claimant, have decided in his favor and the patent has been duly signed, sealed and countersigned and recorded (all of which was done in Payne's case), the title passes to him. Continuing, the Court says: "When by the action of these officers and of the President of the United States in issuing a patent to a citizen, the title to the land has passed from the Government, the question as to the real ownership is open in the courts to all the considerations appropriate to the case."

In the case at bar the Secretary and the President of the United States have settled the question in favor of an aggregation of individuals opposed to one man, and have so declared under seal and by patent. This one man brings suit against the trustees, the legal representatives of the aggregation, believing that the question as to the real ownership is open in the courts to all the considerations appropriate to the case.

Equity seeks to avoid a multiplicity of suits. If the defeated homestead claimant cannot sue the trustees, in a case of this kind, prior to the conveyance by them of all the lots, what a multitude of suits will be entailed upon him. He would have to sue each individual lot-owner, separately, and it might be years before all the lots were transferred from the board of trustees, so that he would be compelled to bring suit after suit as rapidly as deeds were issued. And then he would be confronted with the question as to how he should sue for the land covered by streets, alleys, parks, public buildings and the like? Unless the law is unquestionably that way, it ought not to be so construed as to produce such hardships and lay such obstacles in the way of a citizen who wishes to go into the courts to have his rights determined.

VI.

The Suit Has Not Abated.

It is contended in Mr. Hainer's brief (p. 8), that the appellees here are no longer in office; that "their successors have been appointed and qualified," and that these appellees are "not now proper parties defendant to this action." He cites Warner Valley Stock Co. *vs.* Smith (165 U. S., 28) and other cases, in support of his contention that this action has abated.

The objection here raised does not bring the case at bar within the case cited, as we believe a careful examination of that case and of the cases cited therein will demonstrate.

While the case of Stock Co. *vs.* Smith, *supra*, was, in form, a suit in equity to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from exercising jurisdiction over certain unpatented lands in Oregon, its main object, as declared on page 33 of the opinion of the Court was to compel the Secretary to issue patents for the lands to the State under the swamp grant. "The mandatory injunction prayed for was, in effect, equivalent to a writ of mandamus to him." Looking, therefore, at the real nature of the action, the Court applied to it the settled rule in mandamus proceedings against a public officer, to the effect that the proceeding abates upon his going out of office. The Boutwell case (17 Wall., 604) is declared the leading case on the question and the language used in that case is extensively quoted. It is quite apparent, therefore, that in the Smith case the rule is carried no further than in the Boutwell case and, indeed, the care taken, at the top of page 33 in the Smith case, to distinguish between the two cases of Co. Comers. *vs.* Sellew (99 U. S., 624) and Thompson *vs.* United States (103 U. S., 480) shows that the distinction is still fully recognized.

The reasons for declaring a suit for mandamus against a public officer abated upon the going out of office of the defendant are stated by Mr. Justice Strong in the Boutwell case and quoted in the Smith case as follows:

"The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. * * * If he be an officer and the duty be an official one, still the writ is aimed exclusively against him as a person and he can only be punished for disobedience. * * * Thus it is the personal default of the defendant that warrants impetration of the writ and if a peremptory mandamus is awarded the costs must fall upon the defendant."

To the above is added the suggestion that the Court cannot compel the performance of a duty after the power to perform has ceased; that if the successor could be substituted he might be mulcted in costs for no default of his own, that he, the successor, might perform the duty if requested, and, in any event, that the successor is not in privity, in regard to such duty, with the defendant.

The case at bar is an altogether different case. We are not asking mandamus. As we have shown all through this argument, we are not seeking to have the defendants directed or controlled in their official action or in the discharge of any duty in connection with their trust. The decree asked for by us would not operate upon the persons of the defendants but upon the title to the land held by them. Ours is not, therefore a personal action. We allege no default on the part of the defendants and charge them with no refusal to perform a duty.

Again, in the Boutwell and Smith cases, the defendants had no interest in the subject-matter of the suit. They were not sued in any representative capacity. Here, on the contrary, the defendants were the holders of the legal title,

representing the future claimants of lots and charged with a trust which passed, as to undeeded lots, to their successors, without formal conveyance, by the express language of the patent to them. (See Appendix) This patent, by the way, follows exactly the form of a patent on an ordinary pre-emption entry, with the important exception that instead of the words of grant being to the patentee " and his *heirs* and assigns " it is here to the patentees " and their *successors* and assigns."

Again, these defendants constitute what is, to all intents and purposes, a municipal board or qualified corporation, with continuing duties and powers which are not changed or suspended by a change in the personnel of the board. This is " Townsite Board No. 6." (Ex. B, p. 18 of Mr. Hainer's brief.) In the act of May 14, 1890, *supra*, these townsite tribunals are described as " *boards* of trustees." (See *proviso* to Sec. 1.) In the circular (10 Land Dec., 666) prescribing their duties they are required, in the second paragraph, to take an official oath; they are told, " Your several *boards* are, as required by the statute, composed of three trustees." In paragraph 16 (p. 671) provision is made for the designation of a chairman and secretary who acts, *ex officio*, as disbursing officer. They are to have a clerk (p. 17) and are to keep a permanent record of their proceedings (p. 18). The trust administered by any particular board is a continuing trust and whoever may be the successors of the present appellees, they are members of Townsite Board No. 6 for Oklahoma Territory and the duties, powers and trusts which were in these appellees, when this suit was begun, are now lodged in their successors.

But if these townsite boards are not, in legal contemplation, municipal boards, still the legal effect of their ceasing to be trustees and of their successors being appointed is simply to cause the transfer or assignment to their successors of the property in controversy, *pendente lite*.

Under such circumstances as are above detailed the suit does not abate. This would seem to be quite clear from an examination of the case of Thompson *vs.* United States (103 U. S., 480) cited and distinguished in the case of Stock Co. *vs.* Smith, *supra*. That was a suit for mandamus, too, but, although directed against an individual while holding the office of township clerk, it was held that the real object of the action was to bind the township as a municipal organization. In the course of his opinion, speaking for the Court, Mr. Justice Bradley said:

"And so, if we regard the substance and not the mere form of things, a proceeding like the present, instituted against a township clerk, as a step in the enforcement of a township duty to levy the amount of a judgment against it, ought not to abate by the expiration of the particular clerk's term of office, but ought to proceed to final judgment, so as to compel his successor in office to do the duty required of him, in order to obtain satisfaction from the township. The whole proceeding is really and in substance a proceeding against the township, as much as if it were named, and is in the nature and place of an execution. If the resignation of the officer should involve an abatement, we would always have the unseemly spectacle of constant resignations and reappointments to avoid the effect of the suit. Where the proceeding is in substance, as it is here, a proceeding against the corporation itself, there is no sense or reason in allowing it to abate by the change of individuals in the office."

In the case at bar we are not even seeking to enforce the performance of a duty by the appellees but to reach certain property the title to which had, as we think, been erroneously conveyed to them instead of to appellant. The reasons for holding that the action does not abate upon a change of the persons acting as trustees, the title having passed to their successors, are much stronger than in the

case quoted from. We refer, also, to the case of County Comrs. *vs.* Sellew (99 U. S., 624), *supra.*

Not only does this case come within the rule laid down in the Thompson case, *supra*, because of the nature of the board of townsite trustees, but it is also within the rule that an assignment or transfer of property which is the subject of litigation *pendente lite*, does not abate the action. In an action between private individuals, where the defendant transfers his interest, this is, of course, the recognized rule. The general rule is well stated and illustrated in S. and N. Ala. R. R. Co., *ex parte* (95 U. S., 221). Its application to cases where the subject-matter of the action is transferred by operation of law is shown in cases where a defendant was adjudged a bankrupt after suit was begun, and his property, including that in litigation, was transferred to his assignee. Such action does not abate. This is expressly held in Eyster *vs.* Gaff *et al.* (91 U. S., 521). That was a suit by the Gaffs to foreclose a mortgage during the pendency of which the defendant, one McClure, was adjudged a bankrupt, and an assignee was appointed, but was not made a party to the foreclosure proceedings. The mortgaged property was sold on decree and bought in by the Gaffs, who sued Eyster for possession. The contention was that all proceedings, after the assignment in bankruptcy, were void and the Gaffs took no title by their purchase, but this Court held otherwise, and, in discussing the questions involved, said :

"So in a suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought would not suspend the proceeding or defeat the title under the decree of the court. The obvious reason for this is, that if, when the jurisdiction of the court has once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to the litigation, and justice would be defeated by the number of these

transfers. Another reason is, that when such a suit is ended by a final decree transferring the title, that title relates back to the date of the instrument on which the suit is based, or to the commencement of the suit; and the court will not permit its judgment or decree to be rendered nugatory by intermediate conveyances.

"We see no reason why the same principle should not apply to the transfer made by bankruptcy proceeding."

See also Doe *vs.* Childress, 21 Wall., 642.

Another answer to the contention that the action has abated, under Stock Co. *vs.* Smith, *supra*, is found in the Oklahoma statutes. In the Boutwell case, as quoted in the Smith case, it was said that "in the absence of any statutory provision to the contrary," the writ must abate on the retirement of the defendant from office. But in the case at bar the interest we are seeking to reach in the hands of the appellees passed to their successors, and, in Oklahoma, provision is made against the abatement of an action in such cases.

The following section will be found in Oklahoma Compiled Laws, Ed. of 1893, page 738:

Sec. (3912) 40. "An action does not abate by the death or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action."

Our contention, then, is that this action has not abated by reason of the facts alleged in the brief of Mr. Hainer, because: 1st. Our action is, in fact, against a board of trustees, to reach property held by them in a representative capacity,

which goes to their successors by operation of law and the jurisdiction of the court having attached, is not divested by a change in the members of the board. 2nd. A change in the membership of the board operates, in law, simply as a transfer, *pendente lite*, of the subject-matter of the suit. 3rd. The local statute provides expressly that such an action shall not abate.

VII.

The Suggestion of Speculation.

Upon the merits of the case counsel come into this Court with an entirely new ground of disqualification against Payne. The case was argued and decided, in both the lower courts, exclusively upon the ground that Payne was a "sooner" and therefore disqualified. Here, very little is said on that proposition and that only in general terms. The entire energy of the gentlemen on the other side seems to be directed towards convincing the Court that even if the Territorial Supreme Court was in error in its view of the law, viz: That Payne's case is governed by Smith *vs.* Townsend, still, the conclusion of the Court should be sustained on other grounds and on grounds not presented to or passed upon by that court. We are inclined to take this as a tribute to the strength of our original brief on the merits of this case.

The attempt to raise this new ground of disqualification is made chiefly in Mr. Speed's reply brief. He assumes to set out the findings of fact made by the Secretary when Payne and other parties were before him in the contest against their homestead claims, but has utterly failed to observe the orderly sequence by which the Secretary took up and disposed of, in succession, the claims of six homestead claimants, in conflict with the townsite claim of East Guthrie, three of them, including Ransom *Payne's*, being for

the N. W. ¼ of Sec. 9, and three, including Veeder B. *Paine's*, being for the S. W. ¼ of Sec. 9. The facts as found by the Secretary on Payne's claim are set forth in his decision in 12 Land Dec., 654, last two lines, and the first paragraph on page 655. The rest of page 655, and first paragraph on page 656, are devoted to a discussion of the law of Payne's case and to conclusions drawn from the facts, but the Secretary expressly found (page 655, first paragraph), that "so far as age citizenship, etc., are concerned, he (Payne) was a qualified homestead claimant." Mr. Speed, by inadvertence, of course, refers to a statement on page 657 by the Secretary as referring to *Payne*, when, in fact, it refers to *Paine*. Mr. Speed says the Secretary found, "that this land was needed for townsite purposes and that *Payne* knew all these facts." What the Secretary said was: "*Veeder B. Paine* knew all these facts." (See last line, 5th paragraph, p. 657.) Owing to this oversight on Mr. Speed's part, it is scarcely necessary to pursue the proposition farther. No such ground of contest as is here suggested was raised before the Secretary, in the contest proceedings, against Payne or Paine or anyone else. It did not enter into the finding of facts by the Secretary as to Payne. It was not even suggested to either of the lower courts in the present action.

But this Court will certainly be slow to announce, as a conclusion of law, that a man, otherwise qualified, is disqualified as a homesteader if he seeks a vacant claim near or contiguous to a town or city, on the theory that such selection is *per se* evidence of bad faith. It is a most pernicious doctrine and utterly ignores the rule that fraud is never presumed but must be affirmatively proven. The expressions used by the Secretary in the case of Guthrie Townsite *vs.* Paine *et al.*, 12 L. D., 653, were not intended to be taken as adopting any such general proposition of law. In the case of Bennett *vs.* Cravens, 12 L. D., 647, de-

cided the same day, the same Secretary found in favor of Cravens who, he says (p. 652), "could not fail to be convinced that land immediately adjoining a growing town would soon become valuable." And yet Cravens was not disqualified.

But this question is not in the record, and we pursue it no farther,

Respectfully submitted,

HENRY N. COPP,
S. D. LUCKETT,
Attorneys for Appellant.

APPENDIX.

[*Copy of Patent.*]

UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Certificate No. 809.

Whereas John Foster, William S. Robertson and Andrew C. Schnell, Trustees of the Townsite Board, Number Six, of the Townsite of East Guthrie, in Logan County, Oklahoma Territory, in trust for the several use and benefit of the occupants of the Townsite of East Guthrie, in said county and territory, according to their respective interests, have deposited in the General Land Office of the United States, a certificate of the Register of the Land Office at Guthrie, Oklahoma Territory, Whereby it appears that full payment has been made by the said John Foster, William S. Robertson and Andrew C. Schnell, Trustees as aforesaid, in trust as aforesaid according the provisions of the Act of Congress, of the 24th of April, 1820, entitled "an act making further provision for the sale of public Lands" and the acts supplemental thereto including the Act of May 14th, 1890, for the West half of Section Nine, in Township Sixteen, North of Range Two West of Indian Meridian, in Oklahoma Territory, containing three hundred and twenty acres, according to the official plat of the survey of said land returned to the General Land Office by the surveyor General, which said tract has been purchased by the Said John Foster William S. Robertson and Andrew C. Schnell, Trustees, As aforesaid, in trust as aforesaid, Now know ye, that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, Have given, and granted, and by these presents do give and grant unto the said John Foster, William S. Robertson and Andrew C. Schnell, trustees as

aforesaid, in trust as aforesaid, and to their successors, the said tract above described, to have and to hold the same, together with all the rights privileges immunities and appurtenances of whatsoever nature thereunto belonging, unto the said John Foster, William S. Robertson, and Andrew C. Schnell, trustees as aforesaid, in trust as aforesaid and to their successors and assigns in trust as aforesaid.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to affixed thereto.

Given under my hand at the City of Washington, the twenty-sixth day of January, in the year of Our Lord, (1892) Eighteen Hundred and Ninety-two and of the Independence of the United States the One Hundred and Sixteenth (116)

By the President:

BENJAMIN HARRISON,
By M. McKEAN, *Secretary.*

D. P. ROBERTS,
Recorder of the Gen'l Land Office.

FILED
JAN 6 1898
JAMES H. McKENNEY,
CLERK.

No. 20.

Brief of Richards & Speed for D. C.

Filed Jan. 6, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

RANSOM PAYNE, APPELLANT,
v.
W. S. ROBERTSON, JOHN FOSTER, and A. C. Schnell and Xenophon Fitzgerald. } No. 20.

BRIEF FOR THE DEFENDANTS ROBERTSON, FOSTER, AND SCHNELL.

In the Supreme Court of the United States.

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RANSOM PAYNE, APPELLANT,
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W. S. ROBERTSON, JOHN FOSTER, and A. C. Schnell and Xenophon Fitzgerald. } No. 20.

BRIEF FOR THE DEFENDANTS ROBERTSON, FOSTER, AND SCHNELL.

STATEMENT OF FACTS.

This appeal comes up on a decree of the supreme court of Oklahoma, affirming an order sustaining a demurrer to the petition in the district court. The petition is by a deputy marshal who entered Oklahoma before noon of April 22, 1889, intending to become immediately after that time a homestead entryman, and who immediately after noon of April 22, 1889, went to the quarter section of land adjoining Guthrie proper and proceeded to claim the land which was that day settled upon for town-site purposes by the inhabitants of East Guthrie.

The petition with great care sets out the fact that before the opening a person or persons, whose names are carefully omitted, inquired of men whom they supposed to be in position to know, whether persons in the Territory before time with commissions, or other authority for their entrance, such as deputy marshals, could, immediately after 12 o'clock on April 22, 1889, take and hold homesteads as against citizens who, starting from the line at 12 o'clock, entered as the acts of Congress and the proclamations of the President required. The petition says that the persons of whom these inquiries were made told the person who made the inquiries that they could so hold such land. The petition then, at page 3, states that Payne, "relying on these opinions and assurances, remained in the Territory as aforesaid," showing that Payne intended before noon of the 22d to take a homestead immediately thereafter.

The petition further states that immediately after 12 o'clock noon of the 22d of April, 1889, the plaintiff settled upon the tract of land in question, immediately began to dig a well, and on the next day made his application to the United States land office for the land.

The petition further states that "at the time he was engaged in digging a well" various other persons entered upon the land, and that numerous other parties came upon the land after it had been settled upon and occupied by the plaintiff as aforesaid and proceeded to stake off and occupy a large part of that land—all of it except ten acres (Record, pp. 16, 17)—as a town site; that there was an application for that land by persons who

claimed to represent a town-site company, which persons—not the town-site company—had entered the Territory before noon on April 22, 1889, and until noon of that day, and then came upon the land after plaintiff had settled upon it as aforesaid; that there was a contest in the land office for this tract between Payne and the settlers of the town site, and that Fitzgerald was also a party to the contest. That the Secretary found in favor of the town-site settlers and awarded the land to them, holding that Payne had entered the country prior to noon of the 22d of April, 1889, and was at noon in the country as a deputy marshal, and that "immediately after 12 o'clock noon of April 22, 1889, he went upon the land in question and commenced to dig a hole in the ground for a well, and as soon as practicable appeared at the land office and made his entry."

That the Secretary further found that the land office below had held Payne's entry for cancellation on the ground that he had entered the Territory prior to the time fixed in the proclamation of the President, and the Secretary found in favor of the town-site settlers.

The petition then avers that the Secretary erred in his construction of the acts of Congress, and that his decision was wrong as a matter of law; that the Secretary of the Interior appointed W. S. Robertson, John Foster, and A. C. Schnell as a special town-site board to prove up and enter the tract of land in trust for the inhabitants of East Guthrie, and execute deeds to the occupants as their respective rights and interests might appear, and that said Robertson, Foster, and Schnell as such special town-site board have proved up and entered the tract of land,

and obtained final certificate and patent therefor; and then (erroneously) alleges as a consequence thereof that "the legal title to said tract of land has passed from the United States and is now vested in the said defendants as aforesaid," and (truly) that said defendants have "the legal title thereto as a town-site board," and that said Fitzgerald claims the land as a homestead entryman. Prayer is that the court establish the right, equity, and title of plaintiff in and to the tract of land; declare and establish a resulting trust in his favor; that the defendants as a town-site board be by the court divested of legal title; and that the legal title be by the court vested in the plaintiff; and that the town-site board be restrained and enjoined from making deeds or conveyances for any part of that tract of land.

The defendants Robertson, Foster, and Schnell are not sued as town-site trustees, but in their individual capacity. Actual occupants of the lots upon the land are not made parties to the suit.

To this petition a demurrer was filed by Robertson, Foster, and Schnell for the reasons that—

First. The court had no jurisdiction of the persons of the defendants.

Second. The court had no jurisdiction of the subject of the action.

Third. That there is a defect of parties defendant, to wit, the actual occupants of the land in dispute, who claim it as a town site.

Fourth. The petition does not state facts sufficient to constitute a cause of action.

Fifth. That several causes of action are improperly joined.

Demurrer was sustained, and plaintiff appealed.

The decision was affirmed in the Oklahoma Supreme Court, and appeal was taken to this Court.

ARGUMENT.

1. This being a suit against Robertson, Foster, and Schnell as individuals, the trial court was correct in sustaining the demurrer.

If it was against them as officers of the Government, to wit, a board of trustees of the townsite of Guthrie appointed by the Secretary of the Interior under the act of Congress of May 14, 1890, then, of course, as was held in the *McDaid Case* (150 U. S., 209), those three defendants are "agents of the Government for the purpose of carrying out the trust thereby created to the extent and as specified, and this included the ascertainment of the beneficiaries in the first instance and the transfer of the property to them," and until these agents of the Government had ascertained the beneficiaries and had transferred the title to them they could not be sued and ordered to convey to some one whom the court considered they should convey to.

Apparently this court will never be done deciding, over and over again, the proposition that such officers can not be made parties defendant and in court litigate the question whether the petitioner or somebody else should be given the paper title to the land.

Since the time of *Litchfield* v. *Register and Receiver* (9 Wallace, 575), indeed since the time of *McClung* v. *Silliman* (2 Wheaton, 369), the decisions have been clear as language could make them, and yet they are again brought in question here.

As was said in the case in 9 Wallace as to the register and receiver:

> If they give patents to the applicants for pre-emption the courts can then, in the appropriate proceeding, determine who has the better title or right. To interfere now is to take from the officers of the land department the functions which the law confides to them and exercise them by the court.

And as the court then said: "This is precisely what this court has decided that no court shall do, but that after the land officers shall have disposed of the question then if any legal right of plaintiff has been invaded he may seek redress in the court." This case has been cited with approval many times—

Marquez v. *Frisbie*, 101 U. S., 474-475, and cases there cited.
Craig v. *Leitensdorfer*, 123 U. S., 210;
Carrick v. *Lamar*, 116 U. S., 426;
Koehler v. *Barin*, 25 Fed. Rep., 161–167;
Casey v. *Vassor*, 50 Fed. Rep., 259;
Railroad v. *United States*, 36 Fed. Rep., 612.

and the question has been decided in many other cases which we do not take the trouble to refer to this case.

The fact that the executive power must first exhaust itself is very clearly put in the cases of *Marquez* v. *Frisbie*, 101 U. S., at p. 475, and *Craig* v. *Leitensdorfer*, 123 U. S., pp. 210 and 211.

The same sort of attempt as this was made in the case of *McDaid* v. *Oklahoma, on the relation of Smith* (150 U. S., 209).

That was a suit to compel the town-site trustees of Guthrie to deed lots to Smith and Bradley, and the decision of this Court upon that point is conclusive. The trustees of that town-site board were held to be agents of the Government for the purpose of making the deeds (p. 219), and that until the trustees conveyed the title did not pass beyond the control of the Executive Department in that regard (p. 220). The principal effort on the other side in that case had been to show that the trustees were not agents for the Government, but agents for the town-site settlers, and the decision of the court against that contention was made with great emphasis at pages 218 and 219.

In this case it further appears that the district court was sitting in and for a county of the Territory, and not sitting as a district court of the first judicial district with the powers and duties of a district and circuit court of the United States, and is not such a court as can take jurisdiction of suits in which the United States or the United States officers are to be sued. In such case the service would be by the sheriff of the county, and might lead at once to friction between the local authorities and the national authorities. It certainly might lead to the absurd position of having the local court order its sheriff to imprison officers of the United States for obeying the Secretary of the Interior rather than some act of the legislature or order of some local court.

That such a suit will not lie in such a court was settled long ago in the case of *Nebraska Territory* v. *Lockwood* (3 Wallace, 236).

That was a case of quo warranto to determine the right of a person to exercise the functions of a judge of the supreme court of that Territory. The proceedings were in the name of the Territory and not of the United States. Upon demurrer the objection was held fatal, and in the last paragraph of the opinion in that case this objection was held to be well taken.

It will be seen that the form of the suit in that case and in this are substantially identical, and the principle is noticed in other cases, among them being *Marquez* v. *Frisbie*, 101 U. S., at p. 475, third paragraph.

2. The reason why the court has not jurisdiction of the subject of the action is very clearly set out in the cases already quoted from and cited, particularly—

Litchfield v. *Register and Receiver*, 9 Wallace, 575.
McCluny v. *Silliman*, 2 Wheaton, 369.
Marquez v. *Frisbie*, 101 U. S., 474, 475.
McDaid v. *Oklahoma*, 150 U. S., 219.

3. That there is a defect of parties defendant, and that the actual occupants of the lots are necessary parties, very clearly appears.

Litchfield v. *Register and Receiver*, 9 Wallace, 578.
Story Eq. Pleadings, sec. 207.
Sears v. *Hardy*, 120 Mass., 529.
Perry on Trusts, sec. 874.

Robertson, Foster, and Schnell, sued here either in their individual capacity, as the complaint states, or in

their official capacity, as will perhaps now be claimed, have no interest in defending this suit.

In the 9 Wallace Case the court referring to the register and receiver—who occupy as to quarter sections the same position that these defendants as trustees occupy as to the lots—say that this objection is fatal; that the register and receiver have no real interest in the matter, and that the bill shows that persons not named are asserting before the register and receiver the legal right to these lands; that these persons so asserting title in themselves are the real parties whose claims of right are adverse to the plaintiff; that if the court should hear the case and enjoin the register and receiver, the real claimants would have no further remedy; that before the register and receiver is the initial point for establishing their right, and that by such a suit, if permitted, valuable and recognized rights might be wholly defeated and destroyed without a possibility of a hearing on the part of the party interested; that these officers do not represent the claimants; that they might let the injunction be issued and thus by a proceeding to which the claimants are not parties strangle the incipient right of the actual settler on the public land.

The last paragraph of that case is a demonstration that the parties in interest, to wit, the occupants of the land, are necessary and indispensable parties in this suit. This case upon this point was followed, without being cited, in a number of cases, but has been cited upon this point very often.

4. That the petition does not state facts sufficient to constitute a cause of action is evident.

It alleges that the petitioner, relying upon what somebody told him, deliberately stayed in the country, intending at the time he so stayed to take a homestead.

Upon this point the case of *Smith* v. *Townsend* (148 U. S., 490) is exactly in point and conclusive against the plaintiff. This does not even have the favorable elements of the Smith Case. Smith not only came in good faith, but he brought his family with him, and he does not appear to have ever attempted to exercise his homestead right, but in the record in the case at bar it appears that, in fact, Payne's was a very flimsy claim at best. In his testimony in support of his homestead entry (Rec., p. 17), he says his family consists of a wife and daughter; they have not resided with him on the land; that his wife is a confirmed invalid and *would not remove to the land;* Newport, Ky., is her residence; that his residence on the land has been continuous except that he has been absent at different times attending to his duties as United States marshal for short periods; that all the land is occupied by trespassers (the town-site settlers), except about 10 acres, upon which he has raised crops, but what crops he does not say; that his property upon the claim on December 14, 1891, when he made the affidavit—after three crop seasons—consisted of one horse, household effects, some oats (evidently for the horse), and nothing else; that he had formerly homesteaded land at Garden City, Kans. This is the deserving farmer who, by profession a deputy marshal, farms with one horse, and without a plow, or a hoe, or a rake, or a wagon, or a barn, or a stable, or a chicken house, or a pig pen, or a fruit tree, or a garden, and whose invalid

wife is not able to remove to the land, but is compelled to remain at Newport, Ky., retaining the child with her; and who can not take the land and hold it as a home in good faith without breaking up his own family.

In his petition he alleges that the land is worth $10,000, yet he alleges on the 14th day of December, 1891, two years and a half after the country opened for settlement, that the total improvements put by him upon that land amounted to—including the labor—$185.

It can hardly be considered that such a farmer is one to be encouraged, or that public policy would be subserved by depopulating a town site in order to give him 160 acres of land in the heart of a town and fit only for town-site purposes.

He does not even pretend that he waited until the other citizens from the line came to this place, or that he did not avail himself of his opportunity while in the country to select a tract of land. The facts stated by the plaintiff make a stronger case against him than the case of *Smith* v. *Townsend* (148 U. S., 490), and the reasoning of the court in that case at pages 496 and 497 applies with even greater force in the case at bar.

The contention of the plaintiff, as is said in that case at page 500—

> would destroy absolutely that equality which was evidently the intention of Congress in the legislation. * * * The evident intention of Congress was by this legislation to put a wall around this entire Territory and disqualify to acquire under the homestead laws any tract within its limits everyone who was not outside of that wall on April 22.

> When the hour came, the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads.

And the court there properly says at page 501 that it must be presumed that Congress knew that many persons were rightfully in the Territory—

> Indian agents, deputy marshals, mail carriers, and many others; and if it intended that these parties thus rightfully within the Territory on the day named should have special advantage in the entry of tracts they desired for occupancy, it would have been very easy to have said so. The general language used in these sections indicates that it was the intention to make the disqualifications universally absolute. * * * It can not be believed that Congress intended that they who were on this right of way in the employ of the railroad company should have the special advantage of selecting tracts just outside that right of way, and which would doubtless soon become the sites of towns and cities. (Pp. 500 and 501.)

And the conclusion in that case is the proper conclusion in this case, that—

> one who was within the Territorial limits at the hour of noon of April 22 was, within both the letter and the spirit of the statute, disqualified to take a homestead therein. (P. 502.)

For the reasons herein given and upon the authorities herein cited it is respectfully submitted that—

First. Upon the statements in the petition Ransom Payne has brought suit in the district court of Logan County, not as a United States court, but on the Territorial side of the court, and that upon that side of the

court he can not sue officers of the United States. (*Lockwood* v. *Nebraska Territory*, 3 Wallace, 236.)

The court therefore had no jurisdiction of the persons of the defendants.

Second. The petition is unquestionably against Foster, Robertson, and Schnell in their individual capacity. If they were sued in their official capacity, the complaint should state that they were sued as trustees. In their individual capacity they are not liable to any action for what they do in their official capacity. In their official capacity they can not be sued before they have executed the deeds required by the law. (*McDaid* v. *Oklahoma*, 150 U. S., 219–220.)

In either case the court would have no jurisdiction of the persons of the defendants for the purposes of the petition.

Third. As trustees they were officers and agents of the United States for the conveyance of lots and held the title to East Guthrie as such trustees, and while so holding it under the act of Congress directing them to ascertain who the proper persons are they could not be sued in court and by an order of court be directed to convey to any person named by the court.

McDaid v. *Oklahoma*, 150 U. S., 218–219.
Litchfield v. *Register and Receiver*, 9 Wallace, 575.
Craig v. *Leitensdorfer*, 123 U. S., 210.
Marquez v. *Frisbie*, 101 U. S., 473.

Fourth. The court below, even if sitting with the powers of a United States court, would not have jurisdiction to divest the town-site board of the legal title and vest it in the plaintiff; establish in the plaintiff the

right, title, and equity to the land and decree a resulting trust in his favor, the board not having as yet deeded the land to anyone.

McDaid v. *Oklahoma*, 150 U. S., 219–220.
Marquez v. *Frisbie*, 101 U. S., 474.
Casey v. *Vassor*, 50 Fed. Rep., 259.

The court therefore had not jurisdiction of the subject of the action.

Fifth. The actual occupants of the town site were necessary parties to this action.

Litchfield v. *Register and Receiver*, 9 Wallace, 575.
Story, Equity Pleadings, sec. 207.
Sears v. *Hardy*, 120 Mass., 529.

Sixth. The petition shows that the plaintiff, a deputy marshal in the country, intending to take land, deliberately remained inside, although warned by the acts of Congress and the President's proclamation to go outside if he wished to take the land. Immediately after noon, on the day of the opening of the Territory, he began to sink a well upon land which was located as a town site while he was at work, 150 of the 160 acres in the quarter section being used as the town site and only 10 acres used by him as a farm; that in two and a half years—after three crop seasons—his farming apparatus consisted of no farming implements, machinery, or tools whatever, but simply of a place to sleep and a horse to ride; that the Land Department upon contest awarded the land to the town site; that, under the act of Congress in that behalf, the Secretary appointed a board of trustees to survey, plat, and deed the land to the actual occupants as a town site,

which that board was proceeding to do when suit was filed, the legal title being in them (so far as it is in such a board, as set out in *McDaid* v. *Oklahoma*, *supra*).

The prayer is now to take the title from those trustees and convey it to the petitioner.

No such case ever did occur. It is what the courts have steadily said never would be done.

The decree below should be affirmed.

HORACE SPEED.

JOHN K. RICHARDS,
Solicitor-General.

FILED.
JAN 6 1898
JAMES H. McKENNEY,
CLERK

No. 20.

Brief of Hainer & Richards for D. C.

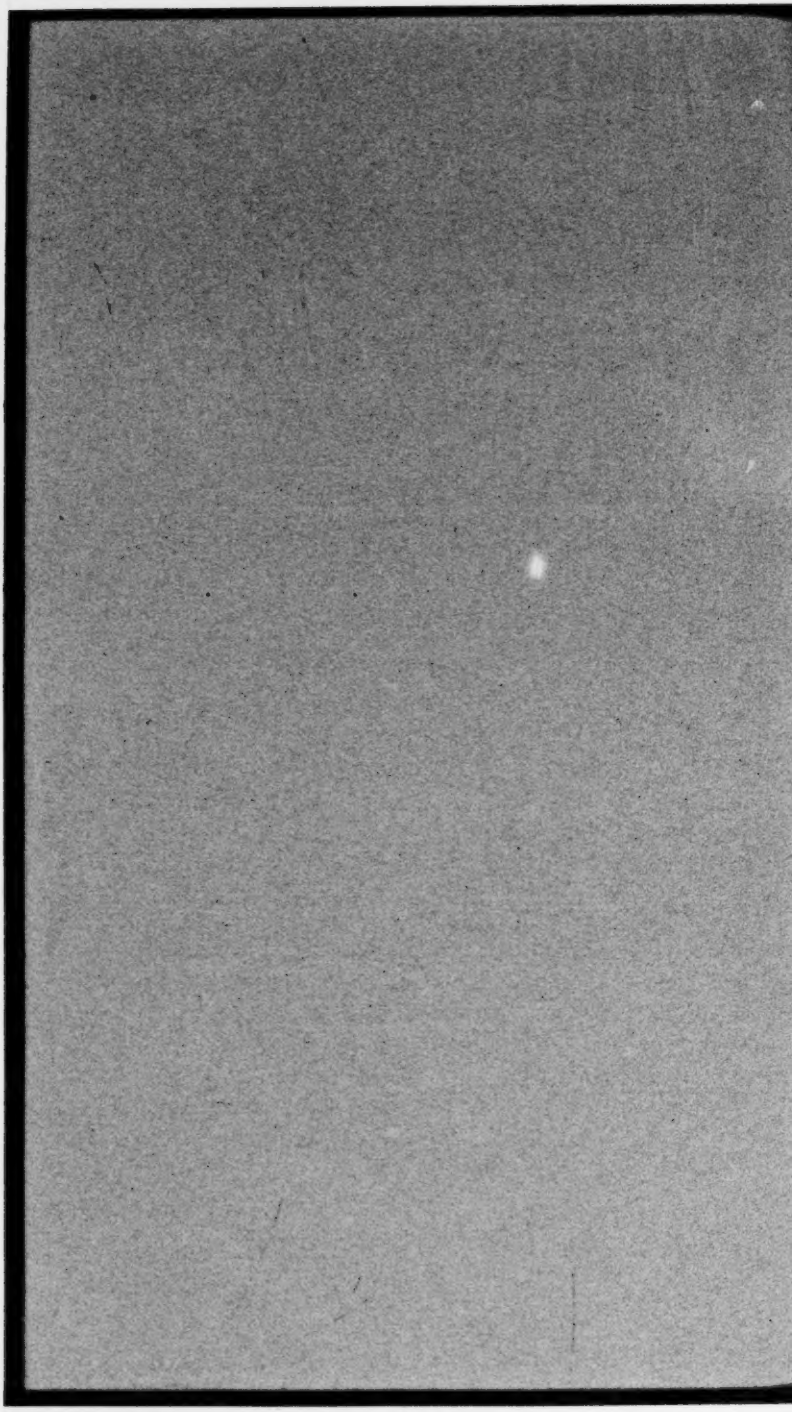
Filed Jan. 6, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

RANSOM PAYNE, APPELLANT,
v.
W. S. ROBERTSON, JOHN FOSTER, A. C. Schnell, and Xenophon Fitzgerald. } No. 20.

BRIEF FOR DEFENDANTS IN ERROR.



In the Supreme Court of the United States.

OCTOBER TERM, 1897.

RANSOM PAYNE, APPELLANT,
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BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This was a bill in equity brought in the district court of the first judicial district of Logan County, in the Territory of Oklahoma, February 2, 1892, by Ransom Payne, appellant here, against W. S. Robertson, John Foster, A. C. Schnell, composing special town-site board No. 6, and Xenophon Fitzgerald, a homestead claimant, for the purpose of obtaining title to the northwest quarter of section 9, township 16, range 2 west of the Indian meridian, being a part of the town site of what was formerly known as East Guthrie, and now, and at the time the action was brought, included within the corporate limits of the city of Guthrie, in the county of Logan, and Territory of Oklahoma.

The bill, among other things, alleges that Ransom Payne, the appellant, was a United States deputy marshal, appointed prior to the passage of the act of March 2, 1889, providing for the opening of the Territory of Oklahoma to settlement, and prior to the proclamation of the President fixing the time for said opening; that Payne entered said Territory prior to April 22, 1889, and was on the present town site of Guthrie at noon of said day; that immediately after 12 o'clock noon of said day, April 22, 1889, he went upon the land in controversy and commenced his settlement as a homestead claimant; that on the 23d day of April, 1889, he filed a homestead entry on the above tract of land at the United States land office at Guthrie, Okla. The Commissioner of the General Land Office and the Secretary of the Interior held Payne's entry for cancellation on the ground that he had entered the Territory prior to the time fixed by the proclamation of the President, and decided in favor of the town-site settlers, and also dismissed the contest of the defendant Xenophon Fitzgerald.

The bill further alleges that W. S. Robertson, John Foster, and A. C. Schnell were appointed by the Secretary of the Interior as a special town-site board (No. 6) to prove up and enter said tract of land, in trust for the inhabitants, and to make and deliver deeds to the occupants thereof, as their respective interests might appear; that said defendants, as such special town-site board, have proved up and entered said tract of land and obtained final certificate and patent for the same, and that the legal title to said tract of land has passed from the United

States and is now vested in said defendants as aforesaid. The bill further alleges that the defendants W. S. Robertson, John Foster, and A. C. Schnell were about to commence making deeds for said tract of land to the various occupants who were claiming the same as a town site, and unless enjoined and restrained would make and deliver deeds to various persons for portions thereof, thereby clouding plaintiff's right and requiring a multiplicity of suits to set aside and cancel such conveyances and many actions at law to dispossess them.

The prayer of the bill is as follows:

> The plaintiff, being without any remedy at law, asks that his right, equity, and title in and to said tract of land be established; that a resulting trust be declared and established to said tract of land in favor of the plaintiff; that said defendants, as a town-site board, be divested of the legal title, and that the same be vested in the plaintiff, he being ready and willing, should the court so decree, to pay the $200 for said tract of land to said town-site board and to do equity on the premises; that said town-site board be enjoined and restrained from making deeds or conveyances for any part of said tract of land to anyone. (Rec., pp. 1–8.)

To this bill the defendants, W. S. Robertson, John Foster, and A. C. Schnell, interposed a demurrer on the ground that the court had no jurisdiction of said defendants or the subject of the action; that they were not proper persons to be made parties defendant; and that the bill of complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendants. (Rec., pp. 19, 20.)

On the 9th day of January, 1893, the district court sustained the demurrer and dismissed the bill at the cost of the plaintiff. (Rec., p. 21.)

Payne appealed to the supreme court of the Territory of Oklahoma and on June 30, 1893, that court affirmed the decision of the lower court (Rec., p. 27), and from the latter decision this appeal was taken.

Pending the appeal of this case, the Secretary of the Interior removed W. S. Robertson, John Foster, and A. C. Schnell as trustees of the town-site board and appointed their successors on May 25, 1893, June 8, 1893, and June 15, 1893, respectively, as shown by the certificate attached. (Appendix, Exhibit A.)

The appellees, W. S. Robertson, John Foster, and A. C. Schnell, have not been, nor has any one of them been, a member of said board since July 22, 1893, and have had no connection personally or officially with the board since that date, as shown by the affidavit of John T. Taylor hereto attached (Appendix, Exhibit B), who was appointed by the Secretary of the Interior one of the trustees of said town-site board and on July 22, 1893, took the oath of office and entered upon his duties as the successor of W. S. Robertson.

ARGUMENT.

I.

The district court had no jurisdiction of the defendants or the subject of the action.

The defendants W. S. Robertson, John Foster, and A. C. Schnell were appointed by the Secretary of the Interior as trustees of the Town-Site board No. 6 assigned to

Guthrie, Oklahoma Territory, under the act of May 14, 1890 (26 Stat., 109, chap. 207), entitled "An act to provide for town-site entries of lands in what is known as Oklahoma, and for other purposes."

These trustees were officers or agents of the United States for the purpose of carrying out the trust thereby created, to the extent and as provided by the act of Congress, and this included the ascertainment of the beneficiaries in the first instance and the transfer of the title to them. While on the final entry the title of the United States was to be conveyed to the trustees, said conveyance was explicitly declared as made "for the uses and purposes in the act provided," and among those uses and purposes was the determination of the rightful claimants of the lots and the issuance of proper conveyances to them. In other words, the trustees were the instrumentality for the transmission of title from the United States to the rightful owners of lots or parcels of land within the town site.

In *McDaid* v. *Oklahoma Territory, ex rel. Smith* (150 U. S., 209, 220), Mr. Chief Justice Fuller, in delivering the opinion of the court, said:

> By the scheme of this act the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the Government until the rightful claimants and the undisposed of or surplus lands are ascertained. The act did not contemplate that the allowance of the entry and the issue of the patent should operate to devolve the final determination of conflicting claims to lots upon these Government appointees, and, until the trustees conveyed, the title did not pass beyond the control of the executive department in that regard.

The bill shows on its face that the defendants were about to make deeds for the tract of land in controversy to various occupants who were claiming the same as a town site, and that the plaintiff sought to enjoin and restrain the making and delivering of deeds to the various persons who were rightfully claiming the various lots or parcels of land upon said town site. (See p. 8 of the record.)

The rule established in *Litchfield* v. *The Register and Receiver* (9 Wall., 575), that the courts will not interfere by mandamus or injunction with the exercise by executive officers of duties requiring judgment or discretion, in the case of a register and receiver of a United States land office, where it is the duty of such officers to determine who are the rightful claimants to certain lands, applies with equal force to trustees of town-site boards appointed by the Secretary of the Interior under the act of May 14, 1890.

Marquez v. *Frisbie*, 101 U. S., 474.
McDaid v. *Oklahoma*, ex rel. Smith, 150 U. S., 209.
Craig v. *Leitnsdorfer*, 123 U. S., 210.
Carrick v. *Lamar*, 116 U. S., 426.
Gaines v. *Thompson*, 7 Wall., 347.
The Secretary v. *McGarrhan*, 9 Wall., 298.

In *Marquez* v. *Frisbie*, Mr. Justice Miller, in delivering the opinion of the court, says:

> We have repeatedly held that the court will not interfere with the officers of the Government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus. *Litchfield* v. *Register and Receiver*, 9 Wall., 552;

Gaines v. *Thompson*, 7 id., 347; *The Secretary* v. *McGarrahan*, 9 id., 298.

And we think it would be quite as objectionable to permit a State court, while such a question was under the consideration and within the control of the executive departments, to take jurisdiction of the case by reason of their control of the parties concerned, and render decree in advance of the action of the Government, which would render its patents a nullity when issued.

After the United States has parted with its title and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before. *Johnson* v. *Towsley*, 13 id., 72; *Shepley* v. *Cowan*, 91 U. S., 330.

II.

The bill should be dismissed because the defendants are not proper or necessary parties to this action.

Another objection equally fatal to the bill is the want of proper or necessary parties defendant to this action. It appears on the face of the bill that the defendants, who were trustees of the town-site board, appointed for that purpose by the Secretary of the Interior, have no real interest in the matter, but that divers persons not named in the bill, who are occupants and the rightful claimants to various lots upon the town site, were asserting claim to this tract of land; and that the trustees were about to issue deeds to them according to their respective interests. These occupants of the town site are the real parties whose interests are affected and whose rights are adverse to that of Payne.

These trustees sustain the same relation to the Department of the Interior as registers and receivers do, and hence the doctrine laid down by the Supreme Court in the case of *Litchfield* v. *Register and Receiver* (9 Wall., 578) is applicable to this case.

It has been shown in the statement of the case that the defendants, W. S. Robertson, John Foster, and A. C. Schnell, have not been members of said town-site board since July 22, 1893, and since this bill has been pending in this court they have had no connection personally or officially with said board or trust; that said defendants have been removed by the Secretary of the Interior, and their successors have been appointed and qualified; that the powers, duties, and trust of the said defendants, W. S. Robertson, John Foster, and A. C. Schnell, came to an end with their retirement from office, and their rights as officers, agents, or trustees of the Government in this cause ceased at that time, and that they have not been since said date and are not now proper parties defendant to this action.

In the recent case of the *Warner Valley Stock Company* v. *Smith* (165 U. S., 28), this court held that—

> A bill in equity against the Secretary of the Interior and the Commissioner of the General Land Office, to restrain them from exercising further jurisdiction with respect to the disposition of certain public lands, and from further trespassing upon the plaintiff's rights of quiet possession thereof, and to compel the Secretary to prepare patents therefor to be issued to the plaintiff, in accordance with law, and to the end that the plaintiff's title may be quieted and freed from cloud, and for further relief, abates, as to the

Secretary, upon his resignation of office, and can not afterwards be maintained against the Commissioner alone.

Secretary v. *McGranahan*, 9 Wall., 298, 313.
United States v. *Boutwell*, 17 Wall., 604, 609.
Commissioners v. *Sellew*, 99 U. S., 624, 626.
United States v. *Schurz*, 102 U. S., 378, 408.
Thompson v. *United States*, 103 U. S., 480, 484.
United States v. *Chandler*, 12[illegible] U. S., 643.
United States v. *Lamont*, 155 U. S., 303, 306.
United States v. *Long*, 164 U. S., 701.

In the case of *McDaid* v. *Oklahoma ex rel. Smith* (150 U. S., 209), it was held that the trustees therein were public officers or agents of the United States.

As the appellees referred to are not now public officers, no decree in this case can reach them, and as their successors can not be brought into the proceeding, and as no decree as prayed for in the bill could be sustained against the appellee Xenophon Fitzgerald, it is submitted that the action necessarily abates.

III.

Payne was disqualified from acquiring title to the land in controversy as a homestead entryman.

Having considered the questions of jurisdiction and want of proper parties defendant, we will now address ourselves to the questions involved on the merits, namely, the qualification of Payne to acquire title to the land in controversy as a homestead claimant.

In a contest proceeding before the Department of the Interior between the town-site settlers of Guthrie and the

appellant herein, Ransom Payne, and other homestead claimants, the Secretary of the Interior, on June 22, 1891, made the following finding of facts:

> Ransom Payne made homestead entry for the NW. ¼ of sec. 9, on April 23, 1889. Said Ransom Payne was a deputy United States marshal, duly appointed prior to the passage of the act of March 2, 1889, providing for the opening of the Territory of Oklahoma to settlement, and prior to proclamation of the President fixing the day for said opening, and he entered said Territory prior to April 22, and was there at twelve o'clock noon on that day, in obedience to orders issued by his superior officers, and he was there in the discharge of his official duties. *Immediately after twelve o'clock noon, on April 22, he went upon the land in question*, and commenced to dig a hole in the ground for a well, and as soon as practicable appeared at the local office and made his entry. So far as age, citizenship, etc., are concerned, he was a qualified homestead claimant, and he bases his claim upon his prior settlement. (*Guthrie town site* v. *Paine et al.*, 12 L. D., 654.)

The Secretary then says (id., p. 655):

> Neither Payne nor his counsel can deny that he took advantage of his presence in the Territory to go upon this tract of land before any other party could reach the same from the borders of the Territory where all law-abiding citizens had halted in obedience to the act of Congress and the proclamation thereunder.
>
> In no act relating to the public domain is the intention of Congress more clearly indicated than in the one under consideration, and that intention was to place all citizens and claimants on an absolute equality, so far as fixing the time when a claim to

land could be asserted and when the initiatory steps toward asserting such claim could be taken. To hold that depaty marshals, trainmen, and others who happened to be within the limits of the Territory in the discharge of their duties and in the receipt of the salary and emoluments of their position at the moment the lands were opened to settlement could take advantage of that fact, and, in advance of others, immediately enter upon desirable tracts to the exclusion of those who had in obedience to law remained outside of the Territory, would be a violation of the clearly expressed intention and spirit of the act. In my opinion, such an interpretation is too unjust to be entertained. The facts in relation to the opening of this country were known to all. Parties who occupied positions similar to that occupied by Payne had abundant opportunity to qualify themselves as claimants by withdrawing from the Territory and placing themselves on a par with others had they so desired. This Payne declined to do, but sought to take advantage of his position to anticipate the arrival of any other claimants from the point they had occupied in obedience to law. This he can not be permitted to do under the law. Had Payne declined to make an act of settlement until after sufficient time had elapsed for those waiting on the border to reach the point in controversy, and thus placed himself on a par with other claimants, a far different state of facts would have existed, and a different rule might have been applied in the consideration of his claim; but under the present state of facts there is neither equity nor law on his side, and your decision canceling his entry is affirmed.

It is asserted in the brief of counsel for appellant that as Payne was lawfully within the Territory at noon

on April 22, 1889, he had a right to make homestead settlement on the land in controversy at the time and in the manner he did, and that he was not disqualified to do so under the provisions of the act of Congress of March 2, 1889.

We concede that for the purpose of acting as deputy marshal of the United States Payne could have been lawfully in the Territory, and upon the present town site of Guthrie, at the hour of 12 o'clock noon of April 22, 1889, but for the purpose of taking and acquiring title to the tract of land in controversy under the homestead laws of the United States, his presence at that time and place was expressly forbidden by the acts of Congress of March 1 and 2, 1889, and the President's proclamation issued in pursuance thereof, and his attempted acts of settlement and homestead entry were therefore unlawful and a nullity.

Payne states he was at Guthrie at noon on April 22, 1889, in obedience to an order from his superior officer, the United States marshal for the district of Kansas, and in the discharge of his duty as a deputy marshal he was near the United States land office at Guthrie, for the purpose of maintaining peace. (Appellant's brief, p. 2.)

There is no question but that Payne was sent to Guthrie and authorized to be there for that purpose. The record in this case, however, shows that immediately after 12 o'clock noon on said day, Payne entered upon and made settlement on the land in controversy, and on the next day, April 23, 1889, he made homestead entry No. 4 at the United States land office in the city of

Guthrie, during all of which time he was supposed to be acting and performing the duties of the position of assistant United States marshal.

No doubt Payne was extremely solicitous in enforcing the law and maintaining the peace within the Territory of Oklahoma up to 12 o'clock noon on April 22, 1889, at which time all would-be settlers were detained by the statute and the President's proclamation outside the borders of the Territory, and could not lawfully be where he was, on the town site of the present city of Guthrie. But when 12 o'clock came, and the Territory was thrown open, and the people began to arrive—in other words, when his services as a deputy marshal were needed—he assumed to throw off his official character and as a private citizen attempted to make a settlement upon the land in controversy, filing his homestead entry the next day. He was playing a slick game with the law. Now he was a deputy marshal, and now a private citizen. He was a deputy marshal to get into the Territory and be on a valuable town site at 12 noon; he was a citizen when 12 noon arrived to make his entry and beat the law-abiding citizens who were hurrying at that time from the border line into the Territory.

Counsel for the appellant contend that the true test of the qualification of the entryman under the statute is the question of advantage, relying upon two recent decisions of the Secretary of the Interior, *in re Jacob Kaufman* (21 L. D., 370) and *Hershey* v. *Bicksford et al* (23 L. D., 522).

An examination of the Kaufman Case discloses that the ruling of the Secretary was based upon the following facts:

> One Dunham went to the Territory of Oklahoma in February, 1888, as an employe of the A. T. & S. F. R. R. Co., and remained in said Territory and in the employe of said company ever since. He did not attempt to take up any land when the same was opened for entry, April 22, 1889, and in fact was not at that time of lawful age. November 1, 1890, he bought the improvements on said land from one Williams, a prior entryman, paying him four hundred and fifty dollars therefor, and upon Williams relinquishing his claim to said land, Dunham entered the same.

It will be observed that this was a year and a half after the opening, and that he took no advantage of his presence therein to secure a settlement claim.

The facts in the Bickford Case show that he was in the Territory on April 22, 1889, as a Government contractor and flour inspector, and that he remained in the Territory engaged in said business until his contracts had expired in June or July, 1889, and did not attempt to assert any right or claim to any land until December 31, 1890, when he made application to file upon a homestead.

In each of these cases the Secretary of the Interior finds the party derived no advantage whatever. In the Dunham Case the entryman was a minor, and could not have made a homestead entry had he been otherwise qualified, and did not assert any claim to any land until nearly two years after the opening of the Territory. In

the Bickford Case the entryman was lawfully within the Territory, and clearly gained no advantage by his presence, as he did not assert any right or claim to the land in question until a year and a half after the Territory had been open to settlement. The Secretary therefore distinguishes these two cases from the doctrine promulgated by the Supreme Court of the United States in the case of *Smith* v. *Townsend*, *supra*, and holds that both of these parties were qualified entrymen.

The true construction of the statute here involved is given in the opinion of Mr. Justice Brewer in the case of *Smith* v. *Townsend* (148 U. S., 500):

> The evident intent of Congress was, by this legislation, to put a wall around this entire Territory and disqualify from the right to acquire, under the homestead laws, any tract within its limits, everyone who was not outside of that wall on April 22. When the hour came the wall was thrown down and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads.

But applying the doctrine of advantage and giving this statute the widest possible construction, Payne is certainly disqualified, because the Secretary of the Interior found as a fact that Payne "*immediately after 12 o'clock noon on April 22 went upon the land in question and commenced to dig a hole in the ground for a well, and upon the next day made his homestead entry.*" (*Guthrie Townsite* v. *Paine et al.*, 12 L. D., 654.)

In the same opinion the Secretary further says: "Neither Payne nor his counsel can deny that he *took advantage of his presence in the Territory to go upon this*

tract of land before any other party could reach the same, from the borders of the Territory, where the law-abiding citizens had halted in obedience to the act of Congress and the proclamation thereunder."

The findings of fact and conclusions of law by the Secretary of the Interior conclusively determine this case.

The doctrine has been firmly established by this court that, in the absence of fraud or imposition, the findings of the Secretary of the Interior are conclusive upon all questions of fact as to land claims submitted to him for his decision.

Lee v. *Johnson*, 116 U. S., 48.
Bohall v. *Dilla*, 114 U. S., 47.
Baldwin et al. v. *Starks*, 107 U. S., 463.
Steele v. *Smelting Co.*, 106 U. S., 447.
Smelting Co. v. *Kemp*, 104 U. S., 636.
Quinby v. *Conlan*, 104 U. S., 420.
Vance v. *Burbank*, 101 U. S., 514.
Marquez v. *Frisbie*, 101 U. S., 473.
Moore v. *Robbins*, 96 U. S., 530.
Shepley v. *Cowan*, 91 U. S., 330.
Johnson v. *Towsley*, 13 Wallace, 72.

It is therefore submitted that the decision of the supreme court of Oklahoma Territory was right and should be affirmed.

BAYARD T. HAINER,
City Attorney of Guthrie.

JOHN K. RICHARDS,
Solicitor-General.

APPENDIX.

EXHIBIT A.

UNITED STATES OF AMERICA.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 14, 1897.

I, Cornelius N. Bliss, Secretary of the Interior, hereby certify that William S. Robertson, Andrew C. Schnell, and John Foster were removed from their positions as trustees for town-site entries of lands in the Territory of Oklahoma, and that their successors were commissioned June 8, 1893, June 15, 1893, and May 25, 1893, respectively.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

C. N. BLISS,
Secretary of the Interior.

10607——2

Exhibit B.

In the Supreme Court,
Territory of Oklahoma, *Logan County, ss:*

The affiant, J. T. Taylor, states that he was appointed by the Secretary of the Interior one of the trustees of townsite board No. 6, Oklahoma Territory, and by authority of said appointment he did, on the 22d day of July, 1893, take the oath of office and entered upon his duties as such trustee under said appointment, and has continuously ever since said date held the office of trustee of said townsite board No. 6.

The affiant further states that John W. Foster, W. S. Robertson, and A. C. Schnell, defendants in this action, have not been nor has any one of them been a member of said board since July 22, 1893, and have had no connection personally or officially with said board since said date.

John T. Taylor.

Subscribed and sworn to before me by J. T. Taylor, this 7th day of June, 1897.

[seal.] Alfred T. De Witt,
Deputy District Clerk, United States District Court, First District, Oklahoma Territory.

REPLY BRIEF

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

RANSOM PAYNE, APPELL[illegible],
v.
WILLIAM S. ROBERTSON ET AL. } No. 20.

BRIEF IN REPLY TO APPELLANT'S BRIEF.

STATEMENT OF FACTS OPENED UP BY APPELLANT'S BRIEF.

The petition of appellant (Record, pp. 1–19) by direct averment, or by inference, or by omission, showed all the essential facts of the case.

All possible doubts are resolved by the averments of his brief, which quotes from the Secretary's findings in the case (*Guthrie Townsite* v. *Payne*, 12 L. D., 654) when before him, and refers to the plats of the public lands survey covering the Guthrie tracts.

By the Secretary's decision, quoted from in the brief at pages 7 and 8, it appears that not only did the Secretary find Payne disqualified because he was a deputy

marshal, who, intending before the opening to take land when the time of opening arrived, deliberately remained in the country, in violation of the act of Congress and the proclamation of the President, but that Payne, with knowledge of all the facts, had abundant opportunity to qualify himself as a claimant to homestead public lands by withdrawing from the Territory and placing himself on a par with others, had he so desired; that he declined to do this, but *sought to take advantage of his position* to anticipate the arrival of any other claimants from the point they had occupied in obedience to law. Referring to that decision (12 L. D., 654) so quoted from, we find that the Secretary further found that the tract was needed for town-site purposes, which fact was known to all the people the day before the opening; and that Payne attempted to settle on the land not in good faith for agricultural purposes, but for speculative purposes, in order to sell the land for lots to the lot occupants. (12 L. D., 654, 656, 657, 659, 661.)

Some of these findings do not at first reading show that they apply to Payne, but at page 655 the Secretary inclusively says, "The facts were known to all;" and at page 657, "The waiting crowds knew all these facts, and they knew that the land in controversy must be used for the homes, the business, and the trade of the people who would compose the population of this coming town."

This finding covers Payne. The decision also shows that the "land in controversy," referred to by the Secretary, was all of sections 8 and 9, and that the tract claimed by Payne was one of the interior quarter sections,

its southwest corner being at the geographical center of the town, the town being now the city of Guthrie, the capital of Oklahoma Territory, and covering all of those sections.

The brief also admits (p. 24) that the tract was "on quite a hill and far from being a desirable agricultural claim." The petition and brief both state that the value of the quarter section was over $10,000, and that Payne's improvements were only worth $185. (Record, pp. 8, 17; Brief, p. 5.) The brief also says (p. 25) that at noon Payne was on the Government acre and not on the tract he now claims.

The explanation of this allegation is, that while the tract he claims does contain the acre fixed for the United States land office by the proclamation of the President opening Oklahoma, dated March 23, 1889 (26 Stat. L., 1546), yet the land office was in fact located on the adjoining quarter section under a subsequent letter from the President to the Commissioner of the General Land Office. Payne must have known, therefore—he does not deny that he did know—the fact which the Secretary of the Interior in his decision says was known by all intending settlers, that "the land in controversy (this and adjoining tracts) must be used for the homes, the business, and the trade of the people who would compose the population of this coming town." (*Guthrie Town Site* v. *Payne et al.*, 12 L. D., 657.)

This court, which takes judicial notice of all facts dependent upon general information and intelligence, will readily see that this tract of land alleged in the bill

and brief to be worth $10,000 is not worth $10,000 for agricultural purposes, but can be worth that amount only for town-site uses. If this is not a "choice claim" in some rich river bottom (Payne's brief, p. 24) and is "far from desirable for agricultural purposes" as admitted in the brief at page 24, then the only use Payne had for the claim was, as the Secretary held in the case—12 L. D. at pp. 558–559—as to the other Paine "that the claim was taken for speculative purposes only to enable him to dispose of the land for town-site purposes, and that it was not taken for agricultural purposes."

The brief says, indeed, at page 24, that Payne's duties kept him close to the local land office, so that he could not mount his horse and ride to some rich river bottom. There is no averment that he wanted a rich river bottom, nor any averment nor any showing that a rich river bottom was not in easy reach, where the public maps and the land-office records of the official survey show the Cottonwood Creek and the Cimarron River flow within a half mile and a mile, respectively, of the land he now claims, and if "the records of the official survey" are matters of which the court will take judicial notice, as suggested in Payne's brief, at page 24, the court will from them notice that Payne went as far to get on the land he now claims as he would have needed to go if he had gone upon the fertile creek valley claim adjoining Guthrie on the north or that on the southwest. If he was under "orders" to preserve the peace at Guthrie, he violated his "orders" by leaving Guthrie at all. If he violated his orders by going a half mile, he can not claim

credit that he there stopped and with the settlers wrangled (Rec., p. 4) over that tract, "far from desirable for agricultural purposes," but valuable for town-site purposes. If he violated his "orders" at all, he could lessen his fault only by going to the fertile valley of the Cottonwood or Cimarron and there, upon a tract fit for agricultural purposes, settle peaceably and without altercations.

But petition and brief show further that before the opening Payne intended to settle on land in Oklahoma and carefully learned that certain officers of the Government, in conversation and by letters, had stated that persons going into and remaining in Oklahoma on "official duty" would not be barred from taking lands (Record, p. 3; Brief, pp. 2–3), and he "relied on" those opinions and assurances and remained in the Territory (Id., p. 3). The necessary meaning of this is that if he had not "relied on" them he would have gone out of the Territory. So in the estoppel idea at brief page 23. But that is theorizing after the fact. Payne knew, as everyone knows, that a deputy marshal is not an "officer" of the United States in any such sense as the brief suggests. Deputies are appointed by the marshal. They have no term of office. He pays them. If he fails to pay them they can not sue the United States for pay. If he directs them to do any act they can refuse, and there is no statute requiring them to obey or punishing them for not obeying. They are practically hired and paid by the job. (See U. S. Rev. Stat., 829–830.) The marshal was their employer. If any of them wished to homestead lands in Oklahoma

no law or fact prevented them from qualifying themselves for it, as the statute and the President's proclamation required of all intending settlers.

HOMESTEAD QUALIFICATIONS.

The suggestion (Payne Brief, pp. 8, 9) that the homestead privilege belongs to every American citizen is wholly erroneous. But a small part of the citizens have the qualifications. To homestead, the citizen must—

First. Be the head of a family or 21 years of age; not a woman living with her husband.

Second. Desire the land for agricultural purposes, actual settlement and cultivation, not for speculation.

Third. Intend to live on it as a home permanently.

Fourth. Not have used the right theretofore. (U. S. Rev. Stat., secs. 2289–2290.)

These are requisites of qualification. Without them the most estimable citizen could not take land under the homestead laws. So the provisions of the statute of 1889 and the President's proclamation thereunder are requisites of qualification. The point was expressly decided in *Smith* v. *Townsend*, 148 U. S., 497–501.

OFFICIALS WERE DISQUALIFIED TO HOMESTEAD.

But it is evident that persons with power of officials of the United States in charge of the opening, within the land to be opened, should not be deemed qualified to contest, in the race for prior settlement, with intending settlers held by the law at the line. Such men must be disinterested, and are by the very necessity of their duty

barred from participating in the contest for the matter desired. They occupy positions of trust, and must do no act and have no interest which can conflict with the trust duty. It is notorious that the deputy marshals who attempted to take lands did, as the brief for Payne shows he did, quit their posts of duty and come into conflict with the settlers at the critical moment when they should have been at their posts of duty performing the duty they were sent into the Territory to perform. They were sent to preserve peace. They took positions, and before the settlers could come from the line or begin the altercations they were sent to prevent, the deputies made off from their posts of duty and attempted to make profit for themselves without regard to their duty.

To make such provisions by statute that the officials in charge of that opening should be wholly disinterested was most natural and right, and simply on a par with the provision that trustees shall not buy at the trust sale, or that a judge shall not act where he has a right or interest in the subject-matter adverse to any party to the case. In those instances the trustee does not forfeit any right; the judge does not forfeit any right. They simply are by the rule delivered from any temptation to do wrong.

If the persons legally inside the Territory could have each taken a claim at noon and the settlers be held at the line until noon, it would have tended to conflict between duty and personal interest, and would have been most unfair to those at the line. Enough people were legally inside the Territory to take all the choice claims in the

country opened. The statute intended to prevent these evils; its enforcement has largely prevented them.

The attempt to distinguish this case from *Smith* v. *Townsend*, *supra*, is not successful. This case is more completely within the statute. Payne went into the country, after the act of Congress and the President's proclamation, for the purpose of preserving peace at the opening. (Payne's brief, p. 1–2.) He intended, before the opening, to take land when the hour of opening came. He does not deny, but by inference admits, that he so intended at the time he went in. (Brief, p. 12.) He admits that when the hour of opening came, he deserted his post and his duty. (Payne's brief, p. 2.) Payne's case is unlike the cases cited of Bickford and Dunham. They did not intend before and at the time of the opening to take land; they did not take land in that race. Payne tried to take this land at that time.

PAYNE'S INTENT WAS SPECULATIVE.

But Payne's claim was from the first speculative, and is to-day. The land was settled on the opening day as a town by the name of East Guthrie. This the petition and brief and the Secretary's decision fully recognize. Before the petition was filed the land had been patented as a town site, platted into lots, blocks, streets, and alleys; and trustees appointed by the Secretary under the act of Congress were about to deed the lots to the actual occupants. This the petition and brief also show and complain of. (Record, p. 6.)

It is right to recognize the fact that the present fight of Payne is not with the hope of gaining this land,

"far from desirable for agricultural puposes," for agricultural purposes. He does not hope to eject the people, move off the houses, close the streets, and on the ruins of the town raise hogs and corn. It is not worth the expense of this suit for that purpose. It can be worth the expense of this suit only for the purpose found by the Secretary in the decision by him (12 L. D., pp. 658–659), "speculative purposes only," to enable him to dispose of this for town-site purposes, not for agricultural purposes and for a home as contemplated by the homestead law" * * * "to enter it as a homestead and then sell it to them at his own price."

Payne can not to-day take, nor could he at any time have taken, as to this tract, the oath required of homestead entrymen—that he desires the land "honestly and in good faith for the purpose of actual settlement and cultivation * * * and that he will faithfully and honestly endeavor to comply with all the requirements of law as to residence, settlement, and cultivation, * * * and that he does not apply to enter the same for the purpose of speculation." (26 Stat. L., p. 1098, sec. 2290.) This statute simply restates the spirit of the former law (12 L. D., p. 657, first paragraph). "Speculative purpose" is bad faith and has barred many shrewdly devised applications for lands adjoining town sites. Excellent illustrations and statements of the principle are found in

Dayton v. *Dayton*, 6 L. D., pp. 167–168.
Same v. *Same*, 8 L. D., pp. 253–254.

SECRETARY'S CONCLUSIVE FINDINGS.

The acts, the knowledge and the purpose (or intent) of Payne are questions of fact, and they have been conclusively found by the Secretary in the case above cited. (12 L. D., at p. 654).

The Secretary finds as facts that Payne was in the Territory before noon of the 22d, and immediately after noon went upon the tract of land in dispute; "he took advantage of his presence in the Territory to go upon this tract of land before any other party could reach the same from the borders of the Territory." * * * "Payne had abundant opportunity to qualify himself as a claimant by withdrawing from the Territory and placing himself on a par with others had he so desired." * * * "This Payne declined to do, but sought to take advantage of his position to anticipate the arrival of any other claimants from the point they had occupied in obedience to law. This he can not be permitted to do." (Id., pp. 655-656.) That this land was needed for townsite purposes, and that Payne knew all these facts. (Id., p. 557.)

These findings of fact are conclusive upon Payne. His brief refers to these findings as conclusions of law, but questions of knowledge, good faith, and speculative intent are always questions of fact, conclusively presumed sometimes, but always as facts.

Lee v. *Johnson*, 116 U. S., 52.
Carr v. *Fife*, 44 Fed. Rep., 716.

Under these findings Payne certainly—
First. Was not qualified to take lands.

Second. Took advantage of his official position.
Third. Acted with a speculative intent.
Fourth. Acted not in good faith as a homestead settler.

PAYNE'S PETITION WITHOUT MERIT.

Payne's petition is without merit; it is unconscionable; he asks a court of equity to ruin a town upon what by the most favorable view of his own showing would be a bare technicality. Baldly, his claim is that equity should give him a tract of land where now is a living town of thousands of people upon the ground that he got first to the land, "began to dig a hole," and next day filed on the land. There is not one statement of merit in his claim. He has made no recompense to the Government for such a favor. Granting his petition would not increase the common wealth, but decrease it by just so much as a quarter section, "far from desirable for agricultural purposes," (see Payne's brief, p. 24) is worth for such uses less than when it is part of the capital town of a growing Territory.

If a court of law could grant such relief it would be deemed a harsh, hard measure.

This court has taken its stand in much more meritorious cases in equity.

In *Mississippi Railway* v. *Cromwell*, 91 U. S., 643, under an execution sale in the United States court in Iowa, Cromwell bought 1,714 shares of the railroad stock for $50, for which the marshal executed his bill of sale. Cromwell then filed his bill to compel the railroad and a county to transfer the stock to him. The

stock was worth either $32,000 or nothing. Upon appeal this court, in an opinion by Justice Bradley, ordered the bill dismissed, and said:

> * * * The stock would have been nothing but an empty name, and the attempt to keep it afloat for speculative purposes is not such as should recommend it to a court of equity. The parties to such a transaction ought at least to be left to their remedies at law. A court of equity should have no sympathy with any such contrivances to gain a contingent or speculative advantage, if any such is to be gained. * * * He (the complainant) comes into court with a very bad grace when he asks to use its extraordinary powers to put him in possession of $30,000 worth of stock for which he paid only $50. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law. This has been so often held on bills for specific performance and in other analogous cases that it is unnecessary to spend argument on the subject.

In *Randolph* v. *Quidnick Co.*, 135 U. S., 457, after the Sprague properties had been assigned and the assignment attacked as invalid in Rhode Island and Connecticut, a creditor attached and under execution bought in stock worth $500,000 for $275 and brought suit to establish title to the stock. Upon appeal, this court affirmed the decree dismissing the bill, and in the opinion by Justice Brewer quoted the above and said:

> The immense disproportion between the value and the cost shocks the conscience of a chancellor and forbids the supporting action of a court of equity. Some rights must have suffered and some wrong

> must have been done by such a transaction, and a court of equity properly says it will not lend its aid to further such an unconscionable speculation. * * * It is a case where equity, true to its ideas of substantial justice, refuses to be bound by the letter of legal procedure or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of honest creditors who have trusted for the payment of their debts to the legal validity of proceedings theretofore taken.

These cases state principles always acted upon, and the books are full of cases applying them. To grant specific performance as substantially prayed for in this bill, the contract or right must be shown to be perfectly fair, equal, and just in all its terms, and that it will not work an injury to third persons, nor be harsh nor oppressive, and the complainant must affirmatively show that he comes with clean hands.

> *Pope Manufacturing Co.* v. *Gormully*, 144 U. S., 236-237.
> *Seymour* v. *Delancey*, 6 Johns. Chy., 224.
> Tiedeman Equity, section 497, notes 6-7.

In *Curran* v. *Holyoke Water Power Co.* (116 Mass., 90), the owner of lands sold a lot with such boundaries as would have made the street only 50 feet wide, and later laid out the street 60 feet wide, and sold other lots to persons who built thereon and whose properties would be greatly damaged if the street were contracted to 50 feet.

The court said (p. 92), "his right to a specific performance of the agreement is not absolute, but rests in the discretion of the court, to be exercised upon equitable considerations in view of all the circumstances of the

case," and specific performance was refused because of the injury to the lot owners; and he was left to sue at law. (*Thomas* v. *Deering*, I Keen, 729.)

To destroy this town would injure the public interests; and for that reason Payne should be left to his suit at law.

Conger v. *Railway Company*, 120 N. Y., p. 32.
Pomeroy Equity, 2d Ed., p. 2165. Note.

It is evident that the actual occupants of the lots would be greatly injured by the action sought by the bill. They are not parties to this suit. If Payne has any right to those lands he can sue the lot occupants in ejectment; or he can sue the Government for its breach of contract, if any. In the cases above cited from the 91 and 135 U. S. the complainants showed a scintilla of recompense, of expenditure, but Payne shows none. They paid $850 and $275, respectively, but Payne pays nothing.

RELIEF AS TO FITZGERALD.

The improper joinder of Fitzgerald in the suit with the town-site trustees, does not give Payne any right to a decree as to this land in any wise. The suit was prematurely brought, as held in the cases cited; was for land Payne shows himself disqualified to take; and any decree as to it in Payne's favor would tend to hamper and injure the trustees and the lot occupants.

The demurrer to the bill was properly sustained, and the decision should be affirmed.

Respectfully submitted.

HORACE SPEED.

JOHN K. RICHARDS,
Solicitor-General.

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PAYNE *v.* ROBERTSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 20. Submitted January 17, 1898. — Decided February 28, 1898.

A deputy marshal of the United States, duly appointed as such prior to the passage of the act of March 2, 1889, c. 412, providing for the opening of the Territory of Oklahoma to settlement, and prior to the proclamation of the President of March 23, 1889, fixing the time of the opening of the lands for settlement, and who entered on said lands and remained there in his official character prior to the day fixed for said opening, was thereby disqualified from making a homestead entry immediately upon the lands being opened for settlement.

PAYNE, the appellant here, filed his bill of complaint in the District Court for the county of Logan and Territory of Oklahoma, First Judicial District, against the present appellees. It was averred in the bill that prior to the passage of the act of Congress of March 2, 1889, providing for opening the Oklahoma lands for settlement, the complainant had been

duly appointed and qualified as a deputy marshal of the United States, and that after the proclamation of the President, on March 23, 1889, declaring that said lands would be open to settlement after noon of the 22d of April, 1889, complainant, in pursuance of orders of his superior officer, the marshal of the United States for the District of Kansas, went into the Territory, to the locality where the United States land office at Guthrie was located, for the purpose of preserving public order. That being rightfully in said Territory and possessed of all the qualifications required by the act of Congress to authorize an entry of lands in such Territory for the purpose of a homestead, complainant, after twelve o'clock noon of said April 22, 1889, settled upon a named quarter section of land, at once commenced digging a well thereon, and claimed the same as his homestead, and that on the next day he duly entered said tract of land at the United States land office in Guthrie, paid the necessary charges and expenses connected with such entry, and thereafter fully complied with all other requirements of the homestead law. Though the bill averred that at the time of his going into the Territory to perform the duties of deputy marshal, complainant "had formed no purpose or intention in regard to selecting and taking a homestead when said lands should be duly opened to settlement," nevertheless it was averred elsewhere in the bill, that in reliance on certain opinions and assurances of the Commissioner of the General Land Office and the Secretary of the Interior, claimed to have been communicated to parties similarly situated as was the complainant, to the effect that persons so situated were not disqualified from entering a homestead when the lands became opened to settlement, complainant remained in the Territory and made the settlement in question. It was further averred that, subsequent to such entry and settlement, the defendant Fitzgerald went upon and claimed said tract of land as a homestead, and that other parties, by force and against the notice and warning of the complainant, proceeded to stake off and occupy a large portion thereof as a townsite in violation of law and of the prior superior homestead rights of the complainant. It was also averred

that on May 9, 1889, the townsite claimants instituted proceedings in the United States land office at Guthrie, Oklahoma, to obtain a cancellation of the homestead entry of complainant, and that ultimately such entry was cancelled, the Secretary of the Interior approving the action of the Commissioner of the General Land Office in ordering such cancellation, on the ground that complainant was disqualified by his presence in the Territory prior to the time fixed in the proclamation of the President, from making the entry. It was further averred that subsequently the Secretary of the Interior, in pursuance of the provision of the act of May 14, 1890, c. 207, appointed the defendants Robertson, Foster and Schnell to prove up and enter the tract of land claimed for a townsite, in trust for the inhabitants of a town to be called East Guthrie, and that after final entry by such trustees a patent of the United States was duly issued to them, which it was claimed vested in said defendants the legal title to the land covered by the patent.

In conclusion, complainant averred that he had done all things required by law in order to be entitled to a final patent, and that he was the equitable owner of the land claimed by him; that the Secretary of the Interior had misapplied and misconstrued the law in cancelling the entry of complainant; and he prayed that the townsite trustees might be divested of the legal title to the tract in question and it be vested in complainant. The bill was demurred to upon various grounds, and the demurrer being sustained a decree was thereupon entered dismissing the bill. On appeal, this decree was affirmed by the Supreme Court of the Territory, and from the decree of affirmance an appeal was taken to this court.

Mr. Henry N. Copp, *Mr. S. D. Luckett*, *Mr. John W. Daniel* and *Mr. Amos Green* for appellant.

Mr. Solicitor General, *Mr. Horace Speed* and *Mr. Bayard T. Hayner* for appellees.

Mr. Justice White, after stating the case as above reported, delivered the opinion of the court.

Opinion of the Court.

In sustaining the demurrer the lower courts passed upon but one of the grounds stated therein, namely, that which asserted that the complaint did not set forth a cause of action. This contention went to the merits of the case and called for a decision of the question whether the Secretary of the Interior, upon the facts found by him, properly held that Payne was disqualified from making his alleged entry. As this is the pivotal point in the case and its decision is free from difficulty, we shall confine ourselves, in this opinion, to its consideration.

The ruling of the Secretary of the Interior that the settlement made by complainant was invalid is averred in the bill to have been based upon the following finding of facts:

"Ransom Payne made homestead entry for the N. W. ¼ of section nine (9) on April 23, 1889. Said Ransom Payne was a United States deputy marshal, duly appointed prior to the passage of the act of March 2, 1889, (16 C. L. O. 10, 11,) providing for the opening of the Territory of Oklahoma to settlement, and prior to the proclamation of the President fixing the day for said opening, and he entered said Territory prior to April 22, and was there at noon of that day in obedience to orders issued by his superior officer, and he was there in the discharge of his official duties. Immediately after 12 o'clock noon of April 22 he went upon the land in question and commenced to dig a hole in the ground for a well, and as soon as practicable appeared at the local office and made his entry. So far as his age, citizenship, etc., are concerned he was a qualified homestead claimant, and he bases his claim upon his prior settlement."

The statute which it is claimed was misconstrued and misapplied by the Secretary of the Interior in his decision sustaining the cancellation of Payne's entry, is that portion of section 13 of the Indian appropriation act approved March 2, 1889, c. 412, 25 Stat. 980, 1004, which, after stipulating for the disposal of lands acquired from the Seminole Indians to actual settlers under the homestead laws only, except as therein otherwise provided, declared that "until said lands are opened for settlement by proclamation of the President, no person

shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto." It was also claimed that the Secretary misconstrued and misapplied the proclamation of the President of date March 23, 1889, 26 Stat. 1544, fixing the time for the opening of the lands for settlement, particularly that portion which reads as follows:

"Now, therefore, I, Benjamin Harrison, President of the United States, by virtue of the power in me vested by said act of Congress, approved March second, eighteen hundred and eighty-nine, aforesaid, do hereby declare and make known, that so much of the lands, as aforesaid, acquired from or conveyed by the Muscogee (or Creek) Nation of Indians, and from or by the Seminole Nation of Indians, respectively, as is contained within the following-described boundaries, viz.: . . .

"Will, at and after the hour of twelve o'clock, noon, of the twenty-second day of April, next, and not before, be open for settlement, under the terms of, and subject to, all the conditions, limitations and restrictions contained in said act of Congress, approved March second, eighteen hundred and eighty-nine, and the laws of the United States applicable thereto. . . .

"Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the twenty-second day of April, A.D. eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto; and that the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect."

The question presented is, therefore, solely this: Was the complainant disqualified by reason of his entry into the Territory and his presence there at the hour of the opening of the Territory for settlement, under the circumstances stated in the finding of the Secretary, from making a homestead entry immediately upon the lands being opened for settlement?

This question is governed by the case of *Smith* v. *Townsend*, 148 U. S. 490. The point there presented was whether a

railroad section hand, residing with his family on a railroad right of way within the Territory, and who by reason of his employment and residence was present therein at the hour of noon on April 22, 1889, could immediately thereafter legally enter upon public land adjoining said right of way and claim the same as a homestead. A construction was rendered necessary of the second section of the act of March 1, 1889, c. 317, 25 Stat. 757, 759, ratifying and confirming an agreement with the Muscogee (or Creek) Indians, whereby a large body of their lands, subsequently included in the Territory of Oklahoma, had been ceded to the United States. The section referred to declared the ceded land to be part of the public domain and subject to homestead entry. The concluding sentence of the section read as follows:

"Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto."

A construction was also required of the substantially similar provision contained in the act of March 2, 1889, heretofore quoted, and of the "warning" notice contained in the proclamation of March 23, 1889, which we have also heretofore referred to. To aid in construing these provisions resort was had to the history of the times, in order to ascertain the reason of the statutes as well as their meaning, and the conclusion was deduced (p. 496) that the purpose of the legislative provisions referred to was "to secure equality between all who desired to establish settlements in that Territory. The language is general and comprehensive: 'Any person who may enter upon any part of said lands . . . prior to the time that the same are opened to settlement . . . shall not be permitted to occupy or to make entry of such lands or lay any claim thereto.' 'Until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands, or acquire any right thereto.' No excep-

tion is made from the general language of these provisions; and it was evidently the expectation of Congress that they would be enforced in the spirit of equality suggested by the generality of the language."

And, again, at page 500, the court observed:

"The evident intent of Congress was, by this legislation, to put a wall around this entire Territory, and disqualify from the right to acquire, under the homestead laws, any tract within its limits, every one who was not outside of that wall on April 22. When the hour came the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads."

Subsequently, conceding that Smith, the appellant in the case, was lawfully on the right of way of the railroad company, and that he possessed all the qualifications prescribed by the general homestead law, it was said (p. 500):

"He did not have the qualifications prescribed by this statute; and there is nothing to prevent Congress, when it opens a particular tract for occupation, from placing additional qualifications on those who shall be permitted to take any portion thereof. That is what Congress did in this case. It must be presumed to have known the fact that on this right of way were many persons properly and legally there; it must also have known that many other persons were rightfully in the Territory — Indian agents, *deputy marshals*, mail carriers, and many others; and, if it intended that these parties, thus rightfully within the Territory on the day named, should have special advantage in the entry of tracts they desired for occupancy, it would have been very easy to have said so. The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say 'any person who may wrongfully enter,' etc., but 'any person who may enter' — 'rightfully or wrongfully' is implied. There are special reasons why it must be believed that Congress intended no relaxation of these disqualifications on the part of those on the company's right of way, for it is obvious that, when a railroad runs through unoccupied territory like Oklahoma, which on a given day is opened for settle-

ment, numbers of settlers will immediately pour into it and large cities will shortly grow up along the line of the road; and it cannot be believed that Congress intended that they who were on this right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside that right of way, and which would doubtless soon become the sites of towns and cities."

And in concluding its opinion the court held that "one who was within the territorial limits at the hour of noon of April 22 was, within both the letter and spirit of the statute, disqualified to take a homestead therein."

The reasoning of the opinion to which we have referred is fully applicable to the facts of the case under review; indeed, the very character of case now presented was referred to in illustration. In accordance with the views there expressed, we must, therefore, hold that as the appellant was within the Territory just prior to, and at the moment of, time when the land first became legally open to settlement, he was disqualified at that time from entering upon and claiming lands therein as a homestead. Manifestly, Congress did not intend that one authorized to enter the Territory in advance of the general public, solely to perform services therein as an employé of the Government, should be at liberty, immediately on the arrival of the hour for opening the Territory to settlement, to assume the status of a private individual and "actual settler," and make selection of a homestead, thus clearly securing an advantage in selection over those who, obedient to the command of the President, remained without the boundaries until the time had arrived when they might lawfully enter.

Affirmed.